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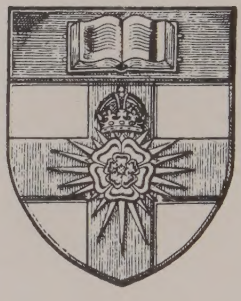

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THE

CRIMINAL APPEAL REPORTS

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING,

AND MR. JUSTICE HAMILTON.

EDWARD HILL.

1911
28 *September.*

Murder.

Counsel who intends to call witnesses for the defence other than the defendant has an absolute right to open his case to the jury.

Appellant was convicted at the Central Criminal Court, before Avory J., on September 12th, 1911, of the wilful murder of his wife, and was sentenced to death. He now applied for leave to appeal against his conviction.

A. C. Fox-Davies, for appellant (under s. 10 of the Criminal Appeal Act), who was present. There were two indictments—one for murder and one for arson; the latter is still on the file, so that if the Court should quash this conviction appellant will not necessarily go scot-free. At the trial very great stress was laid on what appellant said on arrest: "I know nothing about the woman, I am not married. You want my brother." These words were said to disclose a guilty knowledge, and by the direction of the judge the jury were told they might take into consideration when coming to a decision as to the guilt or innocence of the prisoner the fact that he had made false statements. But since the trial it had been discovered that there was actually on that day a summons to be heard against his brother-in-law, taken out by appellant's sister. Throughout the trial and in his summing up the learned judge took up an attitude of hostility to the appellant and hampered the action of his counsel. I was not permitted to get from a police officer in cross-examination the result of certain inquiries made by him, which would have been favourable to appellant. This may not be strictly evidence, but it is the uni-

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versal practice of the defence in criminal courts. The learned judge forced me to give up my statutory right of opening my case to the jury, which I was entitled to do before calling my witnesses, as I was calling others besides appellant. I tried twice to do so, but on four occasions I was told the better practice was not to do so, and I did not feel justified in persisting further. In the course of some hundreds of statements, comments, and interruptions which the learned judge made during the case, there was not one which could in any way be said to be favourable to appellant. His summing up was throughout favourable to the Crown, evidence and points made in argument for the defence were either ignored or misrepresented. For instance, the case was that the deceased woman was found in a room lying on the bed with a bandage tied in a reef-knot tightly round her neck, and the bed and room had been set on fire by a lamp which was standing under the bed. The suggestion of the defence was that she was so drunk that she might have done all this herself. The learned judge stated that the evidence disclosed she had had one drink only, whereas the evidence that she had had more, though known to be available, was excluded. Again, the learned judge said it was unlikely the woman would have struck a match herself to light the lamp, because the room would be quite light at nine o'clock on a July morning. This theory also was most unfairly ridiculed by the learned judge. But the room was small and badly lighted, there were dark curtains, and the bed was in a corner. Finally, he said: "Supposing you think that the death of this woman was caused by the violence of some person other than herself, it is unnecessary for you to consider exactly how these events came about." This was, in the circumstances, clearly a misdirection if, as the defence contended, the sequence of events as detailed by the prosecution was impossible. On the other hand, the learned judge failed to deal by any means fairly with the evidence for the defence as to an *alibi*. The woman met her death at Caledonia Street, King's Cross, somewhere between 10.15 and 10.55, and several witnesses were called to prove that appellant was in a public-house in Southwark at 10.30; the appellant could not have got there between 10.15 and 10.30, and the attention of these witnesses was called to the matter on the same day by appellant's arrest. The trial was, therefore, unsatisfactory.

Bodkin, for the Crown, was not called upon.

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The LORD CHIEF JUSTICE: We have listened very carefully to counsel's able argument, in which he has explained the general allegations in the notice of appeal (drawn by the appellant himself) as to the conduct of the trial. Mr. Fox-Davies agrees with the appellant that he was improperly interfered with in the conduct of the defence. We will say at once that whoever the judge may be, if it appears that his conduct of a case has led to a mistrial, we should interfere and quash the conviction. We wish also to say that in a murder case, or any other case where counsel for the defence is calling witnesses other than the prisoner, he has a perfect right to open his case before calling his evidence, without interference of any kind on the part of the judge. In this case, if we thought he had been actually prevented from exercising his right, and that it had had any effect upon the result, we should have been obliged to consider the matter seriously, but it appears to have been accepted ultimately by counsel as advice from the judge, and we do not think he is entitled to complain of it now. No doubt the learned judge's comments on the case were strong, but we must look at the evidence to see if they were justified. We are not here to deal with questions of style and manner. Counsel's real difficulty in this case was the overwhelming evidence against appellant. The *alibi* which has been relied upon was not set up at the police court, although appellant made a statement as to his whereabouts. The fire call to the house in Caledonia Street was at 10.55: the *alibi*, if accurate as to fact and time, might put appellant in the public-house as early as 10.30. But even if he was in Caledonia Street at 10.15 he could have committed the murder. There was evidence before the jury that he was seen in the room at 7.50; no one else was seen there on that day. A step was heard on the stairs about 10.15. We have carefully considered the comments in the summing up which have been criticised, and we feel that the judge was entitled, and perhaps bound to make them, unfavourable to the defence as they are. Something occurred between 10.0 and 10.55 to cause the death of that woman, which the jury found, obviously rightly, could not have been brought about by herself. Appellant was arrested at 2.0; he had been drinking between 11.0 and 2.0. It has been suggested that undue weight was attached to what he

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then said, and that there was a summons against the brother on that day, which explains his statement. We accept that as to the latter part of it. But he also said: "I know nothing about the (or 'a') woman: I am not married: I was not at Caledonia Street this morning." There was no reason for him to say that, unless something had happened to his wife that morning.

Application dismissed.

A. S. C. C.

CHARLES ELLSOM.

Murder.

Conviction quashed on the ground of a misdirection that a statement of a witness contained particulars of grave importance to the issue, based on a mistaken assumption that that statement had been in the hands of the defence.

Appellant was convicted, before Avory J., at the Central Criminal Court on September 13th, 1911, of the wilful murder of Rose Ann Render, and sentenced to death. He now applied for leave to appeal against conviction and to call further evidence.

A. S. Comyns Carr, for appellant (under s. 10 of the Criminal Appeal Act), who was present. The murder was committed at Wilmington Square, Clerkenwell, between 2.0 and 2.10 a.m. on Sunday, August 20th. The case for the Crown depended entirely on the evidence of one Fletcher, a man of most disreputable character, and of two prostitutes with whom he lived in circumstances which shewed that he had considerable control over them. They alleged a complete and detailed confession to them by appellant, made at about 2.30 the same morning at their house in Stanhope Street, Hampstead Road, about two miles from the scene of the murder. Without their evidence appellant could never have been put upon his trial. No blood was found on appellant or on his clothes, except a few spots in his coat pocket, which were attributable to a slight cut on his hand: this was remarkable as the pavement where the murder took place was covered with blood. The wounds were inflicted face to face, and Fletcher alleged that appellant produced a bloody knife from his

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Darling J.
Hamilton J.

trouser pocket, in which no stains were feund. The only independent piece of evidence against appellant was that of a woman who heard a scream of "Don't, Charlie, don't," and going out, found the body on her doorstep. Appellant called two most respectable witnesses who supported his story that he was at a coffee-stall within a few minutes' walk of Fletcher's house at the time of the murder. This was suggested to be a mistake in the time on their part, but it was physically impossible for the visit to the coffee-stall to have taken place between the murder and the visit to Fletcher's house. This point was not noticed in the summing up. The learned judge treated Fletcher's story as requiring corroboration, but laid the greatest possible stress upon the fact that statements had been taken by the police from Fletcher and the two women independently on the day of the murder. He assumed that all three statements had been put in evidence and seen by counsel for appellant, whereas this only applied to those of the two women. Fletcher's first and second statements had never been put in or shown to the defence, although the nature of his cross-examination, being based largely upon discrepancies between his evidence at the trial and his depositions, would have rendered it admissible. Acting on this assumption, the learned judge asserted that the following points, which Fletcher stated in his evidence, had all been mentioned in his first statement taken on the day of the murder: (1) That on August 14th Fletcher lent appellant 1*s*., and accompanied him to a shop where he bought a large chef's knife for 10*d*. (the shopkeeper deposed to selling such a knife for that price on that day to someone); (2) That on the morning of the murder appellant had shown him the same knife and had called attention to blood and fat upon it; (3) That Fletcher had then thrown the knife down a gulley (where it was found by the police on August 22nd); (4) That appellant had told him that the girl when he struck her the first blow had screamed, "Don't, Charlie, don't"; (5) That he had stabbed her eight or nine times (this agreed with the medical evidence). If this assumption was correct, clearly the comments of the learned judge were of the most convincing and deadly character. At the conclusion of the summing up, counsel for the Crown corrected the technical error of the learned judge, saying: "The actual statement made by Fletcher has not been produced, although it is

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capable of being produced. . . . They do not all three stand on the same footing, that is all." But the judge, the jury, and the defence—none of whom had seen the document—continued to assume that if it had been produced it would have been found to substantiate all the assertions enumerated above. A subsequent examination of it shews that there is no reference to any one of them. With regard to the purchase of the knife there is a most significant discrepancy, for the only reference to any matter which could relate to it is a statement that Fletcher gave appellant 7*d*. for a lodging, whereas the knife cost 10*d*., and in his next statement on August 26th, the 7*d*. had grown to 1*s*. This statement contained the points relied upon by Avory J., but by that time Fletcher had ample opportunity to ascertain them, as the first day of the inquest was August 23rd, when, even if he was not himself present, a full account, including "Don't, Charlie, don't," and the description of the wounds, appeared in the evening papers. If this statement had been in the hands of the defence and used for Fletcher's cross-examination, it is very possible he might have broken down, in which case no jury could have convicted on the evidence of the women. Apart from that, if these most telling points had not been included in the summing up, forming the very basis of its argument, it is impossible to say with certainty that the jury would have convicted: see *Stoddart*, 2 Cr. App. R. at p. 245 (1909), especially in view of the fact that they had to weigh Fletcher's story against appellant's *alibi*. It was impossible to take this point at the trial.

[The LORD CHIEF JUSTICE: The question upon which we desire to hear counsel for the Crown is whether Avory J. could have summed up as he did, if he had known what we know now as to the statement made by Fletcher on the morning of Sunday the 20th.]

Bodkin (*Travers Humphreys* with him), for the Crown. The prosecution never put forward Fletcher as being anything other than a disreputable person. It is true that Avory J. was inaccurate in saying that the first statement contained the passages referred to, and that corroboration of Fletcher could be obtained in this way. But in other respects Fletcher was amply corroborated. The whole of his evidence was given in the fullest detail before

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Hamilton J.

the magistrate, less than a week after the occurrence. What happened with regard to the statements was that the first was taken by a police officer, and only the main facts, quite sufficient if true to demonstrate appellant's guilt, were elicited. Then, as enquiries proceeded, Fletcher was interrogated by more experienced persons as to other matters, and his whole story was thus obtained, his second statement being taken on the Thursday following the crime. The first and second statements substantially agreed with the evidence given before the magistrate. The main points of the story were corroborated by the two women, whose evidence was in fact stereotyped at 3.45 p.m. on the day of the murder. The use which was made by the Crown of their statements, which were actually put in, was to shew that their story could not at that time have been concocted, so that the theory of the defence as to a conspiracy between these three could not be supported. The account which Fletcher said that appellant had given him of the order and nature of the wounds was also corroborated in the most remarkable way, by the evidence of the doctor, given for the first time at the trial: he then said that in his opinion the first wound was, as described by Fletcher, one in which the knife was stopped by contact with a bone. Apart altogether from Fletcher's evidence, there was ample evidence to go to the jury in the story of the two women, and every reason to suppose that even if the summing up had omitted the points now attacked they would have come to the same conclusion. Statements of witnesses are usually regarded as part of the brief for the Crown, but, in circumstances such as these, if Fletcher's statement had been asked for it would have been shewn to the defence, as were other statements and police reports which the defence used in the trial.

DARLING J.: This case, besides being in any event of great gravity, is of exceptional importance because it is the first capital case in which the Court finds it necessary to set aside a conviction. In a capital case, nothing but a feeling that such a course must be taken would induce us to adopt it. We think it necessary to say that we do not express the slightest opinion as to whether this appellant is guilty or not; we are only dealing with the conviction, and the question whether that can stand. That a brutal murder was committed there can be no doubt, and we think it fair

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28 *September.*

CHARLES ELLSOM.

Darling J.

to say that nothing we are doing or saying is to be taken as implying that there is any suspicion in our minds that Fletcher had anything to do with the commission of this murder. This case is an example of what we have often said, that only points of real gravity should be taken in this Court: several have been argued which were perfectly proper to be submitted to the jury, but once the verdict is given it is useless to repeat such arguments. For instance, the *alibi* which was discussed to-day, was before the jury and rejected by them. In this case we desire to repeat and emphasise what the Lord Chief Justice has said on several occasions, that it appears to us after some years' experience of the working of this Act, to be matter of great regret that we have no power to order a new trial, as can be done on appeal in a civil case where a verdict is set aside on such grounds as those on which we feel bound to act to-day. In this Court if a sufficient legal reason is advanced against the conclusion of a judge and jury, we have no alternative but to quash the conviction, and no further proceedings can be taken. This is a case, like many others which have come before us, where it is clearly desirable that all the facts should be submitted again to a jury with an adequate and proper direction. We hope that what we are now saying will be considered by those who have power to amend the law in this respect. The real point in this case is that the witness Fletcher, who gave the most important evidence against appellant, is a man whose general character and part in this affair are such that he required corroboration before the jury could act upon his evidence. On his own shewing he was an accessory certainly after, if not also before, the fact. The corroboration to which we refer is not the technical corroboration which it is the practice to require before allowing the evidence of an accomplice to go to the jury—that was clearly forthcoming. It is that substantial corroboration which a jury would of itself look for, and insist on having before it would consent to act on the evidence of a person like Fletcher. This corroboration was sought in several directions. Witnesses were called who spoke to the same things to which he had testified; and there was thought to be further corroboration. On the same Sunday on the early morning of which the murder was committed, Fletcher made a statement at the police station, which, as the learned judge was led to suppose, included several points which could only have been known to the murderer himself, and

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which afterwards turned out to be accurate. Counsel for the appellant had been obliged to argue that Fletcher and the two women, from whom statements were taken on the same day, had conspired to concoct this story against him; the learned judge pointed out that this was very difficult to believe, because the time was so short and the stories so consistent and accurate. The statements of the two women were actually shewn to the defence, and were made evidence by the counsel for the defence; the learned judge treated Fletcher's statement as if it had also been equally available for the defence. At the conclusion of the summing up counsel for the prosecution pointed out that Fletcher's statement had not been put in, but nothing was said by either side to shew that it had not been seen by the defence, and nothing was said to shew that the statement did not contain the points which had been mentioned. Complaint is now made, and there is no doubt about it, that the learned judge dealt with the statement taken on the Sunday—a statement made by Fletcher within a few hours after the crime—as if it were tantamount to Fletcher's deposition before the magistrate, and his evidence at the trial. He said: "After that, a statement in like manner is taken from Fletcher in writing, signed by him, and that statement is produced here. Although they have not in fact been read, they have been open to the inspection of the learned counsel for the prisoner, and you may be sure that if there were any substantial difference between those statements which they made on that Sunday and the evidence which they gave here to-day, your attention would have been called to it." This is not correct: Mr. Carr never saw the statement before or at the trial, and this very weighty comment was, therefore, ill-founded. Again, "It is in the light of that suggestion that you must look at the evidence of these three people and at the rest of the evidence in the case, and ask yourselves whether it is possible that those three persons, Fletcher, Bernard and O'Connell, could have put their heads together on that Sunday morning, some time between 2.15 in the morning and the time when their statements were taken in the afternoon, and could have jointly concocted a story which they agreed to swear to against this man at the bar, and that that concoction of theirs should have stood the test of an examination before the coroner, an examination before the magistrate, and an examination and cross-examination here in this Court." But this particular state-

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ment was not in the hands of the defence for the purpose of cross-examination. Then the learned judge says this about the purchase of the knife, to which the statement contains no allusion whatever: "True, Fletcher might know that by having gone himself to the shop and bought the knife for himself, or he might know it by having gone to the shop with somebody else not the prisoner and seen a knife bought for 10*d*., but you must bear in mind that all these things have been put together, according to this theory of the defence, by Fletcher on that Sunday morning before he makes his statement to the police, and he must in that interval have invented the story that the prisoner invited him to come to the shop to get a knife and then made a statement to him that he wanted it in order to 'do an Italian fellow in,' who had taken his Rosie away." A little further on he says: "You must bear in mind that Fletcher's account is that . . . the prisoner . . . pulled the knife out and said, 'Look at the blood on it.' Fletcher said, 'You're kidding: what is that fat on it?' The prisoner said, 'That is from somewhere near her heart.' If that is not true, and if it did not take place, you are driven to the conclusion that Fletcher had invented all this conversation upon that Sunday morning before he went to the police and made his statement." But the statement contains no reference to this matter. Nor to this: "Thereupon, Fletcher says he took the knife from him and threw it down a gully in Stanhope Street." Again he says: "Now, these are said to be the prisoner's own words—that he then stabbed her once and felt the knife stop, and she said 'Don't, Charlie, don't,' and clung to the railings; that he knew he had done damage, and stabbed her eight or nine times afterwards. . . . The evidence of Mrs. Riley, the woman who lives at the house outside whose doorstep the woman fell, is that she heard a woman scream 'Don't, Charley, don't.' How did Fletcher know that? . . . How could Fletcher have invented that as part of his story, not knowing, as he could not have known at that time, that Mrs. Riley was available to come and prove it?" Now these words are only found in Fletcher's second statement which was taken six days after the murder, when it had been much talked about, and a report of the coroner's inquest containing these very words had been published in the newspapers. There is, therefore, no ground for the otherwise very cogent comment of the learned judge. There is one other

passage to which I should refer: "When you are considering the statement which Fletcher has made you must consider the description of the wounds given by the doctor. You must bear in mind that at the time when Fletcher concocted that story on that Sunday morning, if he did so, he could not possibly have known what wounds had been found upon the woman or what their situation was." There is no mention in the statement made on the Sunday of the wounds, their number or position, but there is a description of them in the newspaper report. To sum up, these salient points, upon which the learned judge laid great stress, are entirely omitted from that first statement: the purchase of the knife, the throwing of it down the gully, the words "Don't, Charlie, don't," and the description of the wounds. But the matter is treated by him throughout as if that statement contained all these matters. We think it necessary to say that it is plain from what took place at the trial that, although this statement was not before the learned judge or the defence, he thought—not unnaturally in the circumstances—that it had been and was available to Mr. Carr—open to his inspection—and he therefore assumed that there was no difference between it and Fletcher's later evidence. We have to consider the effect upon the jury of all these mistakes. It is impossible to suppose that they had no effect, in view of the very weighty observations repeated many times with emphasis, and supported by references to the supposed statement and to Fletcher's evidence. That was a matter to which the jury must have attached the greatest importance. The position of this Court in such a case is laid down by the Lord Chief Justice in *Stoddart* (2 Cr. App. R. at p. 245): "Attention was called upon this point to the judgment of this Court in *R.* v. *Dyson* (1908, 72 J. P. 272 and 1 Cr. App. R. at p. 15), in which in delivering the judgment of the Court dealing with this proviso [to s. 4 (1) of the Criminal Appeal Act], I said that we could not in that case say that if they had been properly directed the jury must have come to the conclusion which would have supported the conviction. We think it is open to consideration whether the word 'must' is not too strong, and whether the proper question is not, whether if properly directed the jury would have returned the same verdict. We are unable to come to the conclusion that in this case if the jury had been properly directed they would have thought that the facts proved were inconsistent

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with the defendant's innocence, and might not have had a doubt whether the prosecution had failed to satisfy them that the defence set up by Stoddart, that the bogus winners were inserted without his knowledge by persons conspiring against him, was not made out." The question here, therefore, is whether if properly directed the jury would have returned the same verdict. We feel it impossible to say with any certainty that they would. The only judgment, therefore, that we can give is that the appeal must be allowed, and appellant discharged. At the same time, we wish to repeat our regret that we have not power to order a new trial.

Conviction quashed.

A. S. C. C.

FRANCISCO CARLOS GODINHO.

A confession induced merely by a hope of pardon formed in prisoner's own mind is admissible in evidence.

The doctrine of Sexton's Case (1822), *that confessions, to be admissible, must be* ipsissima verba, *doubted.*

Appellant was convicted at the Central Criminal Court on September 8th, 1911, before Avory J., of the wilful murder of Alice Emily Brewster, and sentenced to death. He now appealed against his conviction on a point of law and applied for leave to appeal against it on fact.

H. D. Roome, for appellant (under s. 10 of the Criminal Appeal Act), who was present. A statement made to a police officer by appellant while waiting at Bow Street, and alleged to amount to a confession, was wrongly admitted. It is not suggested that the officer used any threat or held out any inducement, but the statement itself shewed that it was induced by the hope of pardon operating on appellant's mind. This is the real principle behind the decision in *Blackburn*, 6 Cox C. C. 333 (1853), where a statement was excluded because when it was made a document offering a pardon was hanging on the wall of the room, although nothing was said about any pardon by the person to whom the statement was made. The same reasoning was employed by

Patteson and Cresswell JJ. in *Boswell*, Car. & Marsh. 584 (1842), and approved by Pollock C.B. in *Dingley*, 1 C. & K. 637 (1845). The real principle, therefore, is that the inducement, whatever its source, must be really operating on the prisoner's mind when the confession is made. Here the idea of pardon arose entirely in his own mind, being suggested from no outside source, but there is no reason to doubt that if he made any admission it was in the hope of pardon. Then, a confession in order to be admissible must be in the *ipsissima verba* of the prisoner: *Sexton* in 1822 (Roscoe Cr. Ev. 13th ed. 39; Russell on Crimes, 7th ed. 2205). Here the officer only got the sense, if that, of the statement (*a*). In a test to which he was subjected in the witness box he omitted a whole sentence of sixteen words, and transposed another.

[The LORD CHIEF JUSTICE: *Sexton* cannot be right; see Russell, 7th ed. 2180.

HAMILTON J.: It might be distinguished on the ground that in that case the confession was a document.

DARLING J.: Or on the ground that a previous confession had been obtained by the offer of an inducement—two glasses of gin—which also governed the second confession.]

Apart from the confession the rest of the evidence falls short of the certainty required in such a case. It fails to establish the facts alleged, and even if they are established, the inference of appellant's guilt cannot be drawn from them with any certainty. The suggested motive was entirely inadequate: it appeared that after a trivial quarrel, the deceased had treated appellant with great kindness. The medical evidence was that the murderer must have been saturated with blood: only a few spots were found on appellant's clothes, such as might have got there when he discovered the body. The case for the Crown as opened was that the murder must have been committed soon after 3.0 a.m. That was not fully established by the evidence, which shewed that it might

(*a*) See Joy on *Confessions* (1842) at p. 19, where it appears that Best J. rejected *Sexton's* "confession" (quite apart from the question of inducement) on the ground that it was not in his own words.

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have been about 5.15. Avory J. told the jury that that did not matter; but it destroyed the significance of the evidence that appellant was near the scene of the murder at 3.15. Moreover, appellant's whereabouts were satisfactorily accounted for from 5.0 onwards. A point was made by Avory J. that appellant had offered no explanation; the fact was, he was so distrustful after finding that what he said to the officer was given in evidence that he would make no statement whatever to his solicitor or counsel. Since the trial he has made some statement to the governor of the gaol, and he should be allowed, if he will, to give evidence now. The summing up was uniformly unfavourable to appellant, and ignored the points made on his behalf.

Travers Humphreys, for the Crown, was not called upon.

HAMILTON J.: In this case a Miss Brewster, a stewardess on the s.s. *China*, was found one morning in June last in a cabin with her head battered in with some blunt instrument. Appellant was a cabin attendant on the ship, and was suspected of the murder. A question has been raised as to the admissibility of a confession which the prisoner volunteered to a police officer, though without any suggestion or question on his part. The suggested ground is that the operating motive on appellant's mind was the hope of pardon. Where such confessions have been rejected the hope of pardon has been held out, whether verbally or by proclamation, by some person in authority. Where a definite hope of pardon has been held out, but by a person not in authority, the confession has constantly been held to be receivable. A hope of pardon held out by appellant to himself can be in no better position. The other point raised, that the confession must be excluded unless the *ipsissima verba* are given, does not really arise, because the uncontradicted evidence is that the words in question were the actual words. Moreover, the case relied on, *Sexton*, has been much, and probably justly, doubted. It has been contended that the learned judge did not enumerate or summarise the points made for the defence. There was no misrepresentation of the evidence, and there was a clear warning as to its circumstantial character. No doubt, some links in the chain, *e.g.*, the motive, were weak, but attention was called

to this also in the summing up. Several considerations have been advanced which were well worthy of the attention of the jury, but they were properly put before them. It is useless to raise them again now.

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Appeal dismissed.

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BEFORE

MR. JUSTICE DARLING, MR. JUSTICE COLERIDGE, AND MR. JUSTICE HAMILTON.

WILLIAM HENRY RICHARD SAVIDGE.

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Leave to appeal granted in view of a serious mistake in fact in the summing up.

This was an application for leave to appeal against conviction and sentence referred to the full Court by Lush J.

Stephen Lynch for the applicant, who was not present. The applicant was convicted of manslaughter, at the Central Criminal Court on September 9th, and sentenced by Avory J. to nine months' imprisonment without hard labour, the learned judge stating that he did not wish to deprive him of any pension to which he might be entitled through his good conduct and long service in the Navy. Leave to appeal is asked on the ground of misdirection in the summing up by the learned judge. He made a mistake in telling the jury that certain witnesses had not given evidence in the preliminary proceedings, and consequently as there had been no opportunity to test their statements, they should not be accepted so readily as the statements of the witnesses who had been previously called. The witnesses referred to had in fact been called in the preliminary proceedings, and although counsel for the prosecution interposed and tried to correct the misapprehension of the judge, he did not succeed altogether, and the result was that the judge did in fact misdirect the jury.

Application granted (*a*).

S. M.

Solicitor for Applicant—*Goodwin G. Breeze.*

(*a*) See p. 34, below.

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ALFRED SAUNDERS.

Severity of sentence.

This was an appeal against sentence, by leave of Horridge J., and an application for leave to call further evidence. The appellant was convicted of housebreaking, at the Surrey Assizes on July 19th, and sentenced by Phillimore J. to eight years' penal servitude.

Appellant in person. The sentence is too severe, and I want to call a detective, as some of his evidence at the trial was not true.

Wilkinson, for the Crown, was not called upon.

Lord Coleridge J.: The appellant appeals against his sentence of eight years' penal servitude, and he also applies for leave to call further evidence. He has shewn no grounds whatever why we should grant leave to call further evidence, and that application is dismissed. With regard to the sentence passed upon him, there are five previous convictions recorded against him, the last in 1902, when he was sentenced to ten years' penal servitude for shooting in order to prevent his lawful apprehension, and there is still a *remanet* of just over two years in respect of that sentence. He had with him on this occasion a powerful weapon which, if used, would have inflicted serious injuries on the persons attempting to apprehend him. Fortunately for the appellant, he did not use that dangerous weapon on this occasion, and we have come to the conclusion, having regard to all the circumstances of the case, that the sentence shall be altered in such a way that the *remanet* will in effect run concurrently with the sentence of eight years' penal servitude. To effect this, the sentence will be altered to six years' penal servitude to date from the beginning of the Assizes.

Sentence reduced.

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Where part of the finding of a jury is not clear in law, though another part of the finding is an acquittal on certain counts, the judge is entitled to direct them to reconsider their verdict.

The exact purport of s. 38 *of* 24 *&* 25 *Vict. c.* 98, *The Forgery Act*, 1861, *considered.*

This was an appeal on a point of law from a conviction for forgery before the Common Serjeant at the Central Criminal Court on July 26th, 1911. Sentence was postponed.

George Elliott, K.C. (with him *Forrest Fulton*), for the appellant, who was not present.

The defendant was indicted under the Forgery Act, 1861, 24 & 25 Vict. c. 98. There were four counts in the indictment:

(1) Feloniously forging a cheque for £975 on Lloyds Bank, Leicester, in the name of T. Guy Paget, on August 10th, 1909.

(2) Feloniously uttering the said cheque on August 11th, knowing it to be forged.

(3) Feloniously obtaining on August 11th from Albert Wright and Lloyds Bank the sum of £975 under and by virtue of a forged instrument, to wit, the said forged cheque; and

(4) Feloniously causing and procuring to be paid by Albert Wright and Lloyds Bank on August 11th, to a person unknown, £975, under and by virtue of a forged instrument, to wit, the said forged cheque.

Counts 1 and 2 were framed under s. 23, and counts 3 and 4 under s. 38 of the Act.

The facts proved shewed that appellant was acquainted with the handwriting of Mr. T. Guy Paget, and some of his cheques had passed through his hands, but appellant had always denied that he had forged or uttered, or had anything to do with forging or uttering this cheque of £975. In order to establish his innocence, appellant had taken upon himself to prove who was the person who had in fact forged and uttered, not only this cheque, but also the other cheques and documents which formed the subject of separate indictments against the appellant. This person was

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a man of the name of Mackenzie, who had offered to look after the political work of appellant at a time when the appellant was very busy with some important family business. Appellant accepted this offer, believing Mackenzie to be an honest and respectable man, and in the course of this political work Mackenzie had the opportunity of becoming acquainted with the handwriting of Mr. T Guy Paget and the other gentlemen of high position whose names appear in the other indictments. Appellant was not aware of it, but the fact was that this Mackenzie was a very dishonest person, and had been convicted of forgery, and evidence was called by appellant which shewed that this cheque of £975 was in the handwriting of Mackenzie. It is clear that the jury accepted this evidence, for their verdict was originally that the defendant was not guilty of forging or uttering the cheque. They added, however, that he was "guilty of participating in the forgery and in the proceeds of the forgery." It is submitted that this finding of the jury disposed of the whole case—it was a verdict of not guilty, and entitled appellant to be discharged, and the learned Common Serjeant was wrong in refusing to accept the verdict, and in all the subsequent proceedings at the trial. He was wrong in saying "That it was not a verdict at all," and in asking the jury to re-consider their verdict, and in directing them that the question was whether appellant was a "guilty party either in the forging or in the obtaining of £975 from Lloyds Bank by forgery," and that they must bring in a verdict of guilty or not guilty. The jury were entitled to return, and did return, a special verdict that he was not guilty of the forgery, and not guilty of the uttering, and on those two findings of fact there is no other count in the indictment upon which they could found a verdict of guilty. In particular no offence is proved under s. 38 of the Act. If it is conceded that appellant did not forge or utter the cheque, it is impossible for the prosecution to contend that the fact that some of the proceeds of the forgery were found in the possession of appellant would be sufficient to support a conviction on the third and fourth counts of the indictment. The finding of the jury that the appellant did not forge or utter the cheque implies also that he was not in any way concerned in the forging or uttering of the cheque. If that had not been the obvious meaning of the words used by the foreman of the jury, the learned Common Serjeant would have pointed out to the jury that appellant was guilty in law of

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forging or uttering if the forging or uttering was committed by any agent of his or by anyone acting in concert with him. No offence is disclosed under s. 38 of the Act, unless the accused at the time he received the money (1) had the intention to defraud the prosecutor, and (2) knew that the instrument by which it was obtained was forged.

Muir for the Crown. The first question is whether the learned Common Serjeant was justified in refusing to accept the first verdict of the jury. This is concluded by authority.

[DARLING J.: What do you say is the meaning of the final verdict of the jury?]

Muir: The final verdict of the jury was a general verdict of guilty on the four counts of the indictment. According to the shorthand note, the jury were asked, "Do you find the prisoner at the bar guilty or not guilty?" and the foreman replied "Guilty. We recommend the prisoner to mercy."

With regard to the third and fourth counts of the indictment, the view generally taken by those who practise in criminal cases is that a conviction could not be supported under those counts if the prisoner, not having been in any way concerned in the forgery or uttering of the instrument, received or even demanded, after he had obtained information that the instrument was in fact forged, a part of the money obtained by means of the forged instrument. It has always been considered that the section deals with a direct payment made in consequence of the forgery, and unless the person who pays or parts with the money is deceived by the instrument, believing it to be genuine when it is in fact forged, the section does not apply. The Common Serjeant correctly directed the jury that the question was whether appellant was a guilty party either in the forging or the obtaining of £975 from Lloyds Bank by forgery; in other words, was he an accessory before the fact to the forgery? There was evidence that appellant was at the earliest possible moment after the cashing of the cheque dealing with the proceeds of the forgery, *i.e.*, dealing with the actual banknotes given in exchange for the forged cheque, the numbers of which were identified, and there

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is the further evidence that in passing some of the notes he used a false name. With regard to the evidence brought forward by the defence to shew that Mackenzie was the actual changer of those notes, the jury were not bound to believe, and, it is submitted, they did not believe, that evidence. The witness called for this purpose had been convicted over and over again. There was evidence before the jury on which they could properly find the appellant guilty of each and all of the four counts of the indictment.

DARLING J.: There are four counts in the indictment against the prisoner. He is charged (1) with forging a cheque for £975, (2) with uttering it knowing it to be forged, (3) with obtaining the sum of £975 under and by virtue of the forged cheque, and (4) with causing and procuring the sum of £975 to be paid under and by virtue of the forged cheque. The jury, when first asked whether they found the prisoner guilty or not guilty, replied through their foreman, "Guilty of participating in the forgery, and the proceeds of the forgery, but not of forging or uttering the cheque." Thereupon the learned Common Serjeant very properly said it was not a verdict at all, and continued by pointing out that the question was not whether the appellant participated in the proceeds: the question was whether he was a guilty party to this fraud of obtaining money by the forgery or the uttering. The four counts in the indictment were again shortly explained to the jury, and they were asked to re-consider their verdict, and return a verdict one way or the other. The learned judge added that the question was "whether the appellant was a guilty party either in the forging or the obtaining of £975 from Lloyds Bank by forgery," "whether he was a party knowingly—of course not an innocent but a guilty party—to the obtaining of this money by forgery." Mr. Elliott informed us that he could find no fault in the summing up of the learned judge before the first verdict, that there was nothing whatever in it to which he could take exception, but he objects to the jury being asked to re-consider their verdict, and to all that took place after the first verdict. We are of opinion that the learned Common Serjeant was perfectly right in asking the jury to re-consider their verdict, and also in the directions he gave and the observations he made. The material before the jury on which to come to a decision was ample, and they have found a general verdict of guilty, and have recommended

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the prisoner to mercy. They have also found that it was not proved that the appellant forged the cheque with his own hand, or personally presented it for payment.

With regard to the exact meaning and purport of s. 38 of the Act of 1861, the Court expresses no opinion whatever, as it is not necessary to do so in this case, and it must not be assumed that we are prepared to agree either with the very narrow interpretation put upon it by Mr. Elliott, or the more extended (but nevertheless restricted) interpretation put upon it by Mr. Muir.

Appeal dismissed.

Solicitors for the Appellant—*Lewis & Lewis.*

S. M.

WILLIAM LANGSTON, CHARLES FRANKS AND WILLIAM HESLINGTON.

Severity of sentence.

These were appeals against sentence, by leave of Avory J. Appellants were all convicted of housebreaking, and Heslington also of possessing a mould for coining, at Warwick Assizes on July 13th, 1911; Franks was sentenced by Ridley J. to five years', Langston to ten years', and Heslington to seven years' penal servitude.

The two latter were heard in person, and their appeals were dismissed.

Appellant Franks in person. My sentence is too severe. The only proceeds of the housebreaking found on me were a pair of pants. I have never been tried by a judge before. The longest sentence against me before was for three months for "frequenting," and I had to wait four months for my trial. The heaviest sentence I expected to receive was twelve months' hard labour.

Maddocks for the Crown. There are four previous convictions against the prisoner, two of the sentences were two months

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imprisonment, and in the year 1910 there were two sentences each of three months' imprisonment. The indictment on which he was convicted is one of four for similar offences by a gang, and the statements of the other prisoners shew that if Franks did not actually take part in them he was one of the gang.

HAMILTON J.: The appellant was convicted with two others named Langston and Heslington on a charge of housebreaking. There were other charges against Langston and Heslington, and the sentences passed upon them were ten years' and seven years' penal servitude respectively. Franks is 32 years old, and has been convicted four times. In 1905 he was sentenced to two months' imprisonment for assault, in 1906 to two months' imprisonment for attempted false pretences, in 1910 to three months' imprisonment for "frequenting," and later in the same year to three months' imprisonment for aggravated assault. No other offences were proved against him, though we do not say, having regard to the information given about him at the trial, that he may not have been guilty of many other offences. Having given our best consideration to all the circumstances of the case, we have decided to reduce the sentence from five years' to three years' penal servitude, sentence to date from conviction.

Sentence reduced.

S. M.

MARY FERGUSON.

On the question whether an expulsion order should be recommended, the Court will hear evidence on the point whether appellant is an alien or not.

This was an appeal by leave of Lush J. against a sentence of five years' penal servitude passed by the Recorder on a conviction for larceny, at the Central Criminal Court on September 6th, 1911. Appellant had been indicted with Alexander Ivanovitch; both pleaded guilty. Ivanovitch was sentenced to five years' penal servitude and to expulsion. His application for leave to appeal against sentence was (to-day) rejected by the Court.

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Cruikshank for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The sentence is too severe. Although it is said that there have been complaints against the appellant's conduct in America, the only previous conviction proved against her was one of three years' penal servitude in July, 1905. That conviction was her first offence in England, and the punishment was extremely severe for a first offence. The prisoner Ivanovitch, who was jointly indicted with the appellant on this charge of shop-lifting, had been convicted over and over again of this offence, and ought, therefore, to have received a much more severe punishment than appellant. The learned Recorder, however, inflicted the same sentence on both, although appellant had only been convicted once before, the conviction being for larceny, and not ordinary shop-lifting.

G. L. Hardy, for the Crown, was not called upon, but he asked leave to bring before the Court the question of recommending the appellant for deportation after she had served her sentence. Evidence was given before the Recorder that appellant was a subject of the United States, and the fact had never been disputed by the learned counsel who appeared for her at her trial. The learned Recorder, in passing sentence, recommended her for deportation, but in consequence of some doubt arising in his mind as to whether he had before him sufficient legal proof that appellant was an alien, he withdrew that part of the sentence referring to the deportation. This Court has power to reimpose the recommendation for deportation (see s. 21 of the Criminal Appeal Act), and I am instructed to ask for this on behalf of the Director of Public Prosecutions, and am prepared, with the leave of the Court, to call evidence now that the appellant is a subject of the United States. It is submitted also that by s. 7, sub-s. (5) of the Aliens Act, 1905 (5 Edw. 7, c. 13) the onus lies on appellant of proving that she is not an alien.

The Court gave leave to call the further evidence, and after hearing it decided that it was insufficient to prove that appellant was an alien.

HAMILTON J.: The appellant was indicted together with a man named Alexander Ivanovitch, on three separate indictments for shop-lifting, and they both pleaded guilty. The charges against

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them were for stealing various articles from three different shops on the same day. The appellant was convicted in 1905 of stealing a pearl necklace of the value of £2,000 from Christie's well-known auction rooms, by means of an adroit trick, and these subsequent cases of shop-lifting were also carried out by means of adroit tricks, and there is no doubt that the appellant has deliberately adopted a career of crime. We see no reason for interfering with the sentence of the learned Recorder, and the appeal will be dismissed.

Appeal dismissed.

S. M.

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JAMES HENRY JOSEPH HILL.

It is misdirection not to put a substantive defence raised by defendant to the jury though the judge suggests another defence.
Dinnick, 74 *J. P.* 32; 3 *Cr. App. R.* 77 (1909), *followed.*
Machardy, 28 *T. L. R.* 2; 6 *Cr. App. R.* 272 (1911), *doubted.*

Appellant was indicted at the Central Criminal Court before the Recorder on September 7th, 1911, for feloniously wounding a police constable with intent to do him grievous bodily harm. and there was a second count in the indictment charging the same offence, but with intent to prevent his lawful apprehension. The appellant was convicted, but was found to be insane, and was ordered to be detained during his Majesty's pleasure. He now appealed against his conviction, by leave of the Lord Chief Justice.

Oddie, for appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant by his notice disputes the finding of insanity, but after the decision in *Machardy*, 28 T. L. R. 2; 55 S. J. 754; 6 Cr. App. R. 272 (1911), no appeal lies against that finding, and this appeal is against the conviction of guilty of the act charged. Appellant raised a substantial issue of self-defence both at the police court and by cross-examination at the trial, where he was not represented by counsel. He suggested that the constable, whom he was said to have wounded with a

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sharpened file, had attacked him first, knocking appellant down and inflicting wounds on his head with his truncheon. The learned Recorder stopped appellant when he attempted to raise this defence in his cross-examination of the witnesses for the prosecution at the trial, and said he would have an opportunity later of making a statement. The Recorder then of his own motion called Dr. Dyer, who gave his opinion that appellant was insane. Appellant was taken by surprise; he had no intention of raising this defence, which was put upon him much against his will. That being so, it was, to say the least of it, unfortunate that he was never given any opportunity of going into the witness-box, or of putting his defence before the jury. In the summing up there is no reference whatever to the defence actually raised by the questions put in cross-examination by appellant.

[LORD COLERIDGE J.: It amounts to saying, if he is insane he must be guilty; instead of, if he is guilty, then consider whether he is insane.]

The defence which appellant wished to raise would, if put to the jury and accepted by them, have been a complete answer to the charge. Where it is completely ignored no conviction can stand. *Dinnick*, 74 J.P. 32; 26 T.L.R. 74; 3 Cr. App. R. 77 (1909).

Boyd, for the Crown. There is no record of the opening on the shorthand note, but the question of insanity was probably mentioned, because a letter of an insane character was written to a newspaper by appellant on arrest. There has been no substantial miscarriage of justice here. There is no case which says that a conviction will always be quashed merely because the defence has not been left to the jury. The cases when this Court has quashed the conviction on the ground that the defence was not put to the jury were cases in which it could not be said with certainty that the jury would have come to the same conclusion if the defence had been left to them. *Richards*, 4 Cr. App. R. 16 (1910); *Dinnick* (above). The Recorder's omission to put the defence did not affect the verdict of the jury at all. They must have come to the conclusion that they could not accept the defence. There was no obligation on the learned Recorder to

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ask appellant if he wanted to give evidence. *Saunders*, 63 J. P. 24 (1899); C. C. R. In *Warren*, 73 J. P. 359; 25 T. L. R. 633; 2 Cr. App. R. 194 (1909), this Court said that a prisoner should be told of his right, but if he is not, the omission does not affect the validity of the conviction.

DARLING J.: We very much regret to have to give the judgment which is inevitable in this case. The question whether appellant was guilty of the offence charged or not was never left to the jury at all, by such an experienced judge as the learned Recorder. The attention of everybody in the case seems to have been diverted from this point as soon as the question of insanity was introduced. The defence was that appellant was justified in doing what he did because of the unnecessary violence of the constable. Very likely it was a bad defence, and appellant might have been convicted. But it was the essential question, and it was not left to the jury. If it had been left, and the jury had then found appellant guilty of the act charged, they could then have gone on to find him insane. Yet the question of insanity is the only one that was left to the jury, and that has been declared by this Court to be no part of the conviction. The result is that the conviction must be quashed. There is no means after the decision in *Machardy* (above) of questioning at this stage whether appellant is insane or not. The decision in that case was not unanimous, and it is not very easy to understand. We who are sitting here to-day would all be very glad if it could at some time be reconsidered by a higher Court. We can only quash the conviction; we cannot interfere with the finding of insanity.

The only ground on which we could refuse to quash the conviction is that contained in the proviso to s. 4 (1) of the Criminal Appeal Act. But the principle on which that proviso must be interpreted is laid down in a well-known passage in the judgment of the Lord Chief Justice in *R.* v. *Stoddart*, 2 Cr. App. R. at 245 (1909); and *Dinnick's* case lays down that it is a paramount principle of law that the defence must be put fairly before the jury. Here it was not put at all: the learned Recorder put another defence which, perhaps, he thought was better.

Conviction quashed.

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Boyd: There is another indictment for unlawful wounding.

Oddie: That arises out of the same facts, and appellant could successfully plead *autrefois acquit*.

Boyd: Not as to the second count of the first indictment, on which he could not have been convicted of unlawful wounding.

DARLING J.: We must leave him to raise that plea if he likes.

A. S. C. C.

JAMES O'BRIEN.

Proviso to s. 4 (1) of the Criminal Appeal Act applied, though expert evidence of handwriting probably inadmissible had been received.

Appellant was convicted at Chelmsford Quarter Sessions on 18th Sept., 1911, of receiving money, knowing it to have been obtained by false pretences, and sentenced to six months' imprisonment in the second division. He now appealed against his conviction on the certificate of the Chairman.

A. S. Comyns Carr for appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was charged on an indictment of three counts—first for conspiring with one Clarke to obtain money by false pretences, second, for obtaining it, and third, for receiving it knowing it to have been so obtained. The first was withdrawn from the jury by the Chairman, they acquitted on the second, and convicted on the third. Appellant, his brother, Clarke (his brother-in-law), and a man named Grant were all working on a house-decorating job at Loughton. Grant became engaged to be married to the prosecutrix, who was a servant at the house. After they all left she received letters purporting to come from Grant, saying that he was setting up in business, and asking for £20 for the purposes of the business. There was evidence that the address from which the letters came was a shop where letters were taken in. Prosecutrix sent two £10 notes in a letter to that shop addressed to Grant, and the next day appellant cashed the notes with people to whom he was well

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known. Appellant's brother was called for the Crown, to prove that he had bought a bicycle from Clarke and taken a receipt from him; with the object of proving that the signature was Clarke's handwriting, and enabling an expert to identify the writing as that of the fraudulent letters. But the witness did not say that he had ever seen Clarke write, or corresponded with him. He said that he had seen specimens of Clarke's writing, and believed the receipt to be in his handwriting, but gave no reason for thinking that it was his. He declined to swear that the receipt was written by Clarke. That being so, there was no evidence of the writing, and the subsequent evidence of the expert was inadmissible. The cases are summed up in Archbold, 24th ed., p. 447. Although the Chairman warned the jury that this evidence was weak, and although there was some evidence of appellant being found changing the notes, it is clear that the jury were principally influenced by the handwriting, especially as appellant's explanation throughout was that Grant (not Clarke) gave him the notes. This evidence, if admissible, tended to discredit that. It is therefore impossible to say that the jury would have convicted without it.

C. E. Jones for the Crown. Appellant's brother said that appellant suggested, in jest, that it would be a good idea to write a letter to prosecutrix, purporting to come from Grant. That, coupled with the fact that appellant changed the notes the very day they were received, was quite enough for the jury. Even if the evidence as to the writing was not admissible, the Chairman warned the jury to disregard it, so there was no miscarriage of justice. The man Clarke has since been arrested, and pleaded guilty: he could be called if the Court should desire.

Comyns Carr in reply.

LORD COLERIDGE J.: There were three counts in this indictment, but the receiving count was the only one on which the jury convicted. The appellant, Grant and Clarke were at the house where prosecutrix was a servant. Appellant afterwards said it would be a good joke to write to her in the name of Grant; that was after Grant had left the country. Letters were written in the name of Grant; she sent two notes in reply. The next day

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appellant was found dealing with these. The case for the prosecution was that the letters were written by Clarke, not Grant. In the evidence of appellant's brother as to Clarke's handwriting there is some doubt as to what he meant. At one time he seems to suggest that he saw him write, at other times to base his opinion merely on a receipt which he did not see written. To prove handwriting, it is necessary that a witness should have either seen the person write, or corresponded regularly with him, or acted upon such a correspondence. Then the witness may swear to his belief as to the handwriting, but without one of these foundations for his belief the question is inadmissible. For these reasons I personally should be much pressed if the case depended on this question of handwriting. But the Chairman specially warned the jury against acting upon this evidence, and the Court thinks that, apart from it, there was ample evidence on which the jury would in all probability have convicted, and very properly. Sentence may run from date of conviction.

Appeal dismissed.

A. S. C. C.

JOHN LEE.

What is the first reasonable opportunity after the commission of a sexual offence for the prosecutrix to make a complaint (so as to make the evidence of the person to whom the complaint is made admissible) must depend on the circumstances of each case; an early complaint is not necessarily excluded because there has been a previous complaint.

Appellant was convicted at Hull City Sessions on July 27th of an indecent assault, and sentenced to nine months' imprisonment with hard labour. He now appealed against his conviction on a point of law, and applied for leave to appeal against his sentence.

Paley Scott for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Prosecutrix was a servant in the employment of Mrs. Lee, appellant's mother, and the

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assault is alleged to have taken place in the kitchen about 3 p.m. Prosecutrix said that she immediately made a full complaint to Mrs. Lee, who came into the kitchen immediately after the assault. The latter was not called by the prosecution to corroborate this, and it must be presumed that she was not called because she would have denied it. She was called by the defence, and admitted a complaint of assault, but denied the indecent details. Prosecutrix then went home and told her father about a cut upon her thumb, which was alleged to have been inflicted in the struggle with appellant; but she said nothing to him about the indecent assault. Later, about 4.30 or 5 p.m., she spoke to a Mrs. Mussett, and told her the whole story, which Mrs. Mussett was called to corroborate. In order to be admissible such a complaint must be made at the first reasonable opportunity. *Osborne*, (1905) 1 K. B. 551; 74 L.J.K.B. 311; 92 L.T. 393; 69 J.P. 189; 21 T.L.R. 288; 53 W.R. 494; C.C.R. Prosecutrix has herself determined what was in fact the first reasonable opportunity by saying that she complained to Mrs. Lee. In *Lillyman*, (1896) 2 Q. B. 167; 65 L.J.M.C. 195; 18 Cox C. C. 346; 60 J.P. 536; 74 L.T. 730; C.C.R., it was held that the terms of a complaint were admissible, not as evidence of the acts complained of, but as shewing the consistency of the conduct of the prosecutrix with the story told by her in the witness-box. The learned Recorder did not point this out to the jury, and they may have taken the statement as evidence of the charge. On this indictment appellant could have been convicted of a common assault, and there was evidence upon which the jury could have come to that conclusion, but the learned Recorder told them it was unnecessary to consider that issue. He made a strong comment on appellant not having given evidence in the Court below, and suggested to the jury that appellant's story—which was a mere denial—could have been investigated if it had been told at the first opportunity; every defendant, he said, ought to give evidence at the police-court. Appellant had fully set up his denial in cross-examination; he was strongly recommended to mercy by the jury.

S. Fleming, for the Crown, was not called on.

HAMILTON J.: In this case the appeal is against a conviction

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for indecent assault, and also against sentence. It was alleged that the assault took place about 3.0 or 3.30 p.m. The prosecutrix, whose thumb had been cut in the struggle, made a complaint to appellant's mother forthwith. She then went home, where she found her father, and told him about the cut thumb. Then she went to a Mrs. Mussett, to whom she told the whole story. Mrs. Lee was not called by the prosecution, and it may be that the only reason for not calling her was that she was not prepared to support the story of the prosecutrix. In the course of cross-examination, counsel for appellant got from the prosecutrix that she had told Mrs. Lee the same story as she afterwards told to Mrs. Mussett. It is now contended that the evidence of Mrs. Mussett is not within the proposition in the judgment of Ridley J. in *Osborne* (1905, 1 K. B. 561), that such evidence is admissible "only when" a complaint "is made at the first opportunity after the offence which reasonably offers itself." We think that no one could cavil at the lapse of time within which the complaint to Mrs. Mussett was made—namely, within one and a half hours; clearly this was as early an opportunity as could reasonably be expected to offer itself, leaving out the complaint to Mrs. Lee. It is contended that the second complaint was not admissible after the first complaint to Mrs. Lee, or that, the fact of the complaint to Mrs. Lee having been elicited, the prosecution could not fortify it by Mrs. Mussett's evidence. It must depend on the circumstances of each case whether it can be said that the complaint was made on the first reasonable opportunity which offers itself But here we think that both the first complaint was in fact put in evidence on the cross-examination, and the second complaint was available.

Secondly, it is said that the learned Recorder did not himself tell the jury that they must not rely on the complaint as proving the facts in issue. Obviously no cast-iron rule can be laid down in this matter. The nature of the evidence was made quite plain to the jury; and it was made quite plain during discussion in the course of the case that the evidence was admissible as shewing consistency of conduct on the part of the prosecutrix.

Appeal dismissed.

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WILLIAM HENRY RICHARD SAVIDGE(*a*).

The Court will quash a conviction where the judge in directing the jury makes a serious mistake in fact which may have misled them.

Appellant was convicted on September 11th, 1911, at the Central Criminal Court, before Avory J., of manslaughter, and sentenced to nine months' imprisonment. He now appealed (by leave of the full Court) against his conviction and sentence.

Stephen Lynch for appellant, who was present. Appellant, a man with one arm, was employed at a coal-wharf, and had a dispute with some fellow-employees in a public-house, arising out of a strike. He left the public-house first, deceased followed him out; there was a renewed altercation outside (how far from the house was in dispute), appellant struck deceased, who fell and was killed. Deceased was drunk, witnesses for the prosecution said, incapable. He was a much bigger man than appellant. Appellant's evidence was that deceased was the aggressor, that he followed appellant up, and that the fatal blow was struck in self-defence. In this he was corroborated by a number of witnesses, while there were several on the other side. Avory J. directed the jury that the evidence for the defence (other than that of appellant himself) must be discounted on the ground that it had never been given before the trial, and that the prosecution had had no opportunity of testing it. As a matter of fact, all the witnesses had given evidence before the coroner, though not before the magistrate. Counsel for the prosecution endeavoured to correct this mistake, but the learned judge persisted in saying that appellant himself was the only one who gave evidence before the coroner, whereas in fact all the witnesses did.

G. F. Carter for the Crown: It must be admitted that the learned judge was in error, and that the attempt to correct him was not completely successful. But on any shewing there was in strict law no defence to this charge, because appellant did not retreat as far as he might have done before returning the blow of deceased, even supposing one was struck. Appellant's own evidence at the trial was to the effect that he struck the deceased after the latter had turned away from him.

(*a*) See p. 17, above.

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[LORD COLERIDGE J.: Juries are not always of opinion that a man should think of *Canniff*, 9 C. & P. 359 (1840), before returning a blow.]

The misdirection cannot have made any difference to the verdict, because the account given by appellant's witnesses differed materially from his own, and was consistent with appellant having been willing to engage in the fight which had the fatal result; his own evidence was contradictory.

LORD COLERIDGE J.: In this case the principal ground of appeal is that there is a serious misstatement of fact in the summing up. The story of the prosecution was that appellant was in a public-house with the deceased man, that he came out, waited for him, and inflicted an unlawful blow. The appellant called a number of witnesses, four of whom spoke to the events of the night. No doubt their story was inconsistent in various small particulars. But two of the witnesses for the prosecution differed in a material respect from the third. The prosecution said the assault was unprovoked: the defence said that deceased was the aggressor. It was emphatically a case for the jury to say which set of witnesses they believed, or whether they were left in doubt. The learned judge apparently inclined to the view that the witnesses for the prosecution were the more credible. In putting that view before the jury he was unfortunately led into a mistake of fact. He said that none of the witnesses for the defence had ever told their story in Court before. Counsel for the prosecution pointed out that they had given evidence before the coroner; but the learned judge took that as applying only to appellant himself, and repeated that the other witnesses had not been called before. In fact, they had all been called before the coroner, and the prosecution had every opportunity of testing their statements. It is impossible to say, in a case which was so eminently for the jury, that they were not misled by this, or that their verdict would have been the same if they had been accurately directed.

Conviction quashed

Solicitor for Appellant—*Goodwin G. Breeze.*

A. S. C. C.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE HAMILTON, AND MR. JUSTICE BANKES.

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FREDERICK HENRY THOMAS.

Murder.

A judge is not bound to put to a jury a defence resting merely on a hypothesis of impulsive insanity.

This was an application for leave to appeal against conviction. Applicant was convicted at the Central Criminal Court before Scrutton J. on October 10th of murder, and was sentenced to death.

St. John Hutchinson for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant had had relations with the murdered woman, and was found outside the house in the early morning after the murder took place playing with a piece of string. He made two statements confessing that he had committed the murder. The defence at the trial was that the appellant did not know the difference between right and wrong shortly before and while committing the crime. It was not suggested that he was insane now, but that it was a case of impulsive insanity. The judge, in summing up, did not leave the whole of the defence to the jury. He should have left it to the jury that they might find from all the circumstances of the case that the appellant was insane at the time of the murder.

Bodkin and *H. D. Roome* for the Crown, were not called upon.

DARLING J.: The summing up was perfectly correct. The judge might properly have directed the jury that there was no

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evidence of insanity at all. The whole defence rested on mere hypothesis. Impulsive insanity is the last refuge of a hopeless defence. Counsel had quoted at the trial a passage from Taylor's Medical Jurisprudence to the effect that murder might be committed during temporary insanity, but that applied only to rare cases of homicidal mania, when there was no discoverable motive. Here there was the commonest motive in murder cases, jealousy, and there was nothing in the circumstances to support the suggestion of insanity.

Application dismissed.

N. B.

THOMAS WRIGHT.

Leave to appeal against sentence granted in view of applicant's age.

This was an appeal from an order of Lord Coleridge J. refusing leave to appeal against sentence. The appellant was convicted at the Rotherham Borough Sessions on October 10th of burglary, and sentenced to seven years' penal servitude.

DARLING J.: The appellant is only 19 years old. He has been three times previously convicted, and sentenced to three months' imprisonment in 1907 for housebreaking; to four months' in 1909 for shop-breaking, and to six months' in 1910 for stealing. But having regard to the age of appellant, we think that the sentence of seven years deserves further consideration, and we will allow the appeal against the order of Lord Coleridge J.

Leave to appeal granted.

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Darling J.
Hamilton J.
Bankes J.

GEORGE STROUD.

Proviso to s. 4 (1) *of the Criminal Appeal Act applied, where there had been misreception of evidence.*

This was an appeal against conviction on points of law. The appellant was convicted at the Gloucester City Sessions on July 31st, 1911, of receiving fat, knowing it to be stolen. Sentence was postponed.

R. B. D. Acland, K.C., and *Hugh Sturges*, for the appellant, who was present on bail.

(1) Appellant was charged in the indictment with receiving fat, and there was no evidence that he knew the contents of the bag which was deposited on his premises consisted of stolen fat. The only evidence against the appellant was that of a police constable and two (alleged) accomplices who pleaded guilty in the proceedings before the magistrate. The appellant had been in the habit of buying bones and offal from the two accomplices, who were employed in the tallow factory from which the fat was stolen. The constable entered his premises within half a minute of the depositing of the bag, and before appellant examined or had time to examine it. When the constable asked the appellant what was inside, he said that it was bones. It was necessary for a conviction that the prosecutor should prove that the appellant knew the contents of the bag to be fat.

(2) The Recorder had improperly admitted statements made by the two accomplices in the presence of the appellant, to which he had not assented either by words or conduct. Such statements were not evidence against the appellant unless he in some way admitted their truth. *Norton*, (1910) 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 26 T. L. R. 550; 5 Cr. App. R. 65; *Murtrie*, 6 Cr. App. R. 128 (1911). In so far as *Thompson*, (1910) 1 K. B. 640; 79 L. J. K. B. 321; 26 T. L. R. 252; 4 Cr. App. R. 45, is inconsistent with *Norton*, *Thompson* was wrongly decided.

In his summing up the Recorder had not warned the jury that these statements were not evidence against the appellant, and

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had left the contents of them to the jury as though they were evidence of fact.

(3) The Recorder had misdirected the jury in not telling them that the evidence of the accomplices must be corroborated to entitle them to convict. *Everest*, 73 J. P. 269; 2 Cr. App. R. 130 (1909); *Blatherwick*, 6 Cr. App. R. 281 (1911).

Jordan, for the Crown: Apart from the evidence and statements of the accomplices, there was direct evidence of receiving on which the jury could have found a verdict of guilty. If so, no question of corroboration can arise. The case was fought on the "doctrine of recent possession"; it was clearly proved that the fat was stolen and found in the possession of the prisoner within a few minutes of the theft, and therefore it lay on him to explain that he came by it honestly. The jury refused to accept his explanation that he thought the sack contained bones, and not fat. [He was stopped by the Court.]

BANKES J.: From the evidence of the appellant himself the jury were justified in finding that he received the bag of fat knowing its contents to be stolen. He may not have known at the moment the bag was seized whether it contained fat or bones, but there was evidence upon which the jury were justified in finding that he received the bag on his premises knowing that its contents, whether they were one or the other, were stolen property. The statement signed by the two accomplices was wrongly admitted by the Recorder as evidence against the appellant. In accordance with the principle laid down in *R.* v. *Norton*, the judge at the trial should satisfy himself that such statements are admissible on the ground that the prisoner has assented to them, before he allows them to be given in evidence. But the improper admission of the evidence has not led to any miscarriage of justice, and the case is, therefore, one in which the Court would not interfere with the conviction. It was a case where any reasonable jury, if properly directed, would have found a verdict of guilty, and the improper admission of the evidence could not have influenced their verdict.

Appeal dismissed.

Solicitors for Appellant—*R. F. Melville Harvey*, Gloucester.

N. B.

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Hamilton J.
Bankes J.

CHRISTOPHER WILLIAM CRADDOCK STOKES.

Conviction quashed in view of fresh evidence.

This was an appeal against conviction, leave having been granted by Lord Coleridge J. Appellant was convicted at the Wolverhampton Sessions before the Deputy-Recorder on October 6th, of larceny, and sentenced to six months' imprisonment with hard labour.

Lort-Williams for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was the "boots" at a hotel, and was charged with having stolen the bag of a gentleman staying at the hotel. The bag was left in a room on the morning of July 17th, and had disappeared when the owner returned in the evening. Evidence was given at the trial by a waitress at the hotel that the appellant had been on duty alone between 3 and 4 o'clock p.m.; that at 4.30 he had said that a rough man, wearing a muffler and drunk, had fetched the luggage in question; that when taxed with this, he had denied making any such statement; that he had not had occasion that afternoon to fetch any luggage from the station, and if he had, she would have seen him bring it. Evidence was given by a porter at the station that at 6.30 he had seen the appellant carrying a bag corresponding with the description of that stolen from the station towards the hotel. Since the trial the police had discovered that the appellant had carried a bag similar to that stolen from the station to the hotel for a guest of the hotel, and that the stolen bag was in the possession of another man at 4.30 p.m.

Leave was given to re-call the waitress, who said she had recollected since the trial that the appellant had brought a guest's bag from the station to the hotel on that afternoon. Two further witnesses were called by leave of the Court, and stated that the son of one of them had brought the stolen bag to her house at 4.30 on that afternoon, that he was a sailor and wore a muffler, that he was drunk at the time, and that he had been convicted of stealing luggage from stations, and was now confined in a lunatic asylum.

Langley for the Crown: The appellant had not given evidence at the trial, and had not explained his conduct.

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Darling J.

DARLING J.: In view of the fresh evidence, the conviction is too doubtful to stand. The onus was not on the appellant to prove that he did not steal, and having regard to all the facts, the verdict cannot be supported. Under s. 4 of the Criminal Appeal Act the appeal shall be allowed if the Court think that the verdict "cannot be supported, having regard to the evidence." Evidence there means all the evidence, including the further evidence called for the first time before the Court of Criminal Appeal. The conviction must therefore be quashed.

Conviction quashed.

N. B.

SOLOMON ZAUSMER.

This Court may quash a recommendation for expulsion, as being part of a sentence.

This was an appeal against sentence, by leave of Lord Coleridge J. Appellant was convicted at Cardiff City Sessions, on October 6th, of stealing a watch, of which he was a bailee, and sentenced to six months' hard labour, and recommended for expulsion under the Aliens Act.

Appellant, in person, stated that he had been ten years in England, and had a wife and three children here. This was his first offence. He was a Russian subject, and if he were sent back to Russia he would be shot for having deserted from the army in Manchuria.

DARLING J.: Enquiries have been made, and it has been ascertained that the appellant would not be shot if he were deported to Russia. But it is probable that he would be punished for desertion. Having regard to all the circumstances, we think that it is not a case in which it is advisable to inflict the penalty of expulsion. So much of the sentence as recommends expulsion will be quashed, and the sentence of six months' hard labour will run as from the date of conviction.

Sentence reduced.

N. B.

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30 *October.*

Darling J.
Hamilton J.
Bankes J.

FREDERICK DANIEL BRADFORD.

Sentence imposed without jurisdiction reduced.

This was an appeal against sentence, by leave of Lord Coleridge J. The appellant was convicted at the Cardiff City Sessions on October 7th of malicious damage to property, and was sentenced to four months' imprisonment with hard labour.

Stanley Griffith-Jones for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Appellant, who was under 16 years of age, was convicted of having thrown a stone at a Chinese laundry and broken a window. The sentence was one which could not stand. The Court had not certified, as it was bound to do under the Children Act, 1908 (8 Edw. 7, c. 67, s. 102 (3)), before sentencing a young person to imprisonment, that appellant is of so unruly a character that he cannot be detained in a place of detention as provided by the Act, or that he is of so depraved a character that he is not a fit person to be so detained. By s. 106 of the same Act the maximum term of detention in such a case was one month. The appellant was apprenticed to a builder, and bore a good character, and his relations were very respectable people, so that the certificate required by s. 102 could not have been given.

Hugh-Jones, for the Crown, did not justify the sentence.

HAMILTON J.: This sentence cannot stand. The sections of the Children Act applicable to the case were not brought to the notice of the Recorder, and he passed a sentence which he had no power to inflict. The maximum sentence which could have been imposed under s. 106 of the Children Act was a month's detention; and as appellant has already been in prison for three weeks, the Court thinks it unnecessary to substitute the formal sentence which might have been passed, and orders the appellant's liberation from custody.

Sentence reduced.

N. B.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE HAMILTON, AND MR. JUSTICE BANKES.

CLIFFORD DIMES.

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If, on an indictment for rape, the verdict found is that of guilty under s. 4 (3) of 8 Edw. 7, c. 45, it is not necessarily implied that the prosecutrix was a consenting party so as to make her an accomplice.

This was an appeal against conviction by leave of Lord Coleridge J.

The appellant was convicted at the Central Criminal Court of incest, and was sentenced on October 14th, 1911, by Scrutton J. to three years' penal servitude.

Roland G. Oliver for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The charges against the appellant were that on August 23rd, 1911, he had committed (1) a rape on, or alternatively (2) incest with his sister Amy Dimes, a girl 16½ years old. After hearing the evidence the jury found that he was not guilty of rape, and they disbelieved the evidence of the prosecutrix, Amy Dimes, in so far as she swore that the intercourse was against her will and without her consent. The intercourse was accordingly with her consent, and she became an accomplice in the crime of incest, of which they convicted the prisoner. As she was an accomplice, the jury were not at liberty to accept or act upon her evidence without corroboration, and there was not an atom of corroboration. The fact that she complained to her mother on the next day was not evidence to shew that the appellant had committed the offence charged against him, but was merely evidence, admissible on the charge of rape, shewing the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and negativing

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CLIFFORD DIMES.

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consent on her part. *Lillyman,* (1896) 2 Q. B. 167, and *Osborne,* (1905) 1 K. B. 551. There cannot be a complaint if the act done was consented to. A conversation between third parties in the absence of the prisoner, if not a complaint, is not admissible, and on this ground the statement made by Amy Dimes to her mother on August 24th was not admissible in evidence on the charge of incest, and consequently could not be used as corroboration. The evidence of the doctor as to the recent rupture of the hymen, and the evidence of the doctor and the mother as to the stains on the linen and underclothes of the prosecutrix, though they proved that she must have had recent connexion with a man, did not in any way implicate the appellant, or corroborate the allegation of the prosecutrix that it was the appellant who had had connexion with her.

There was a serious defect in the summing up of the learned judge, inasmuch as he failed to point out that if intercourse took place with the consent of the girl she was an accomplice, and the jury were not at liberty to act on her evidence without corroboration. *Stone,* 6 Cr. App. Cas. 89 (1911).

W. H. Leycester for the Crown. Neither the prosecutrix nor her mother in their evidence-in-chief gave any details of the complaint; they merely proved the fact that a complaint was made. It was the appellant who brought out the details by cross-examining these two witnesses, and on the charge of rape this evidence would have been admissible if it had been given in chief.

On a true view of the facts the girl was not an accomplice. She could only be considered an accomplice if on the evidence she gave in the witness-box she could be found guilty of having with consent permitted the appellant, her brother, to have carnal knowledge of her (s. 2 of the Incest Act, 1908, 8 Edw. 7, c. 45).

Her evidence was that she did not consent, but resisted as far as was in her power. The jury considered that the evidence was not sufficient to convict the appellant of rape. It does not follow from this that they were satisfied that the intercourse took place with the consent of the prosecutrix. For the crime of incest consent is immaterial, and in convicting the appellant of incest, it was not necessary for the jury to give, and they have not given, any finding as to whether the prosecutrix consented or resisted. The summing up of Scrutton J. was all in favour of finding the

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CLIFFORD DIMES.

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appellant guilty of the lesser offence. If he had directed the jury that they must find him guilty of rape or nothing, there is little doubt they would have brought in a verdict of guilty of rape. The judge merely impressed upon the jury that it was open for them to say on the evidence that they were not satisfied that the prosecution had proved that the girl had done all in her power to resist the appellant. In a charge of rape the form of the indictment is that the offence was committed "violently, feloniously, and against the will of" the prosecutrix. Mere submission is not necessarily consent. [He also referred to p. 1025 of Archbold, ed. 24.]

If, contrary to this contention, the girl was an accomplice, the corroboration, though not full and ample, was sufficient.

Oliver, in reply: The terms of the complaint appear to have been properly admitted. The test whether the girl is an accomplice is not whether she could be convicted of the offence from her own admissions, but whether she could be convicted of the offence on the facts as found by the jury, and as the true interpretation of the finding of the jury is that she consented she is an accomplice, and there was no corroboration of her story implicating the appellant in the offence. The girl either consented or she did not. There is no middle course.

HAMILTON J.: The appellant Clifford Dimes appeals against his conviction for incest with his sister Amy Dimes, and there was also an application, which has now been dropped, for leave to call further evidence. The appellant was indicted for that he on the 23rd day of August did feloniously, unlawfully and against her will ravish and carnally know Amy Dimes, and he was also indicted for unlawfully having carnal knowledge of Amy Dimes, who, to his knowledge, was his sister, and the jury were informed that by virtue of sub-s. (3) of s. 4 of the Incest Act, 1908 (8 Edw. 7, c. 45), if they were not satisfied that the appellant was guilty of rape, they might acquit him of that offence and find him guilty of incest. Evidence was given that on August 24th, about midday, less than twenty-four hours after the offence, the girl complained to her mother, and in consequence of the complaint the girl's linen and underclothes were submitted for examination to a doctor, and the girl herself was examined

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by the doctor, and her physical condition was found to be consistent with the account she gave of the prisoner's acts on August 23rd. No objection is taken to the admissibility in evidence of the girl's complaint, but it is contended that on the finding of the jury the girl was an accomplice, and that consequently her evidence required corroboration, and that the facts proved at the trial could not in law be regarded as corroboration, as they did not necessarily implicate the appellant. If the girl was an accomplice, corroboration certainly was necessary, but in our view neither from the verdict of the jury nor from the facts of the case can it be inferred that the girl was an accomplice. She stated that she resisted, that she tried to get away, but could not, because he had her arms pulled right back, and she could hardly get her breath, and she then gives further details of her resistance, and of her failure to get away in consequence of the superior strength of the appellant. The jury were directed by the judge that they should not convict of rape unless they were satisfied with the proof given that the appellant had acted violently and against the will of the prosecutrix, and he pointed out, in the appellant's favour, that no screams were heard by the woman in the yard (the prosecutrix did not even allege that she screamed), and no bruises were discovered on the thighs of the prosecutrix, and no other signs of a severe struggle. The jury found that there was not sufficient evidence that she was raped, but they did not find that she with consent permitted the appellant to have carnal knowledge of her. We do not agree with Mr. Leycester that the mere oath of the prosecutrix that she resisted to the best of her strength prevents her from being an accomplice. It was open to the jury to believe that she offered some resistance and eventually submitted, without consenting in the sense of acting of her own free will. There is a distinction between submission and permission. The amount of corroboration required in cases of this sort depends on the degree of complicity of the woman. If the jury had found that she consented, she would of course have been an accomplice. But there is no finding to this effect, nor are we at liberty to infer from the findings that she did in fact consent. But even supposing she was an accomplice (and we hold she was not), there was in this case corroborative evidence implicating the accused, not strong and ample, but sufficient. There was clear evidence that the girl was in the

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appellant's company for many hours on August 23rd, and that they were alone together in the appellant's bedroom for a considerable time. Then there is the complaint to the mother and the evidence as to the stains on the underclothes on August 24th, and the examination of the underclothes and the girl by the doctor on August 28th, and his evidence as to the condition of her hymen and his statement as to her having been a virgin four or five days before his examination on August 28th. It is true that the learned judge in his summing up only uses the word corroboration once, but he draws the attention of the jury very fully to all the corroborative facts, and we cannot see that anything material was omitted in his summing up. We are therefore of opinion that the fullest explanation of the rules with regard to corroboration would not have made any difference in the result—there has been no miscarriage of justice, and this appeal must be dismissed.

Appeal dismissed.

S. M.

EMILIO RUFINO.

The defence of an alibi *must be left to the jury; it is a misdirection if the judge rules it out.*

This was an appeal against conviction, leave having been granted by Lord Coleridge J. The appellant was convicted on October 26th at the Central Criminal Court before Mr. Commissioner Rentoul, of larceny of a pair of field-glasses, and sentenced to three months' hard labour and recommended for expulsion. The principal witness for the Crown being ill, his deposition before the magistrate was read.

A. C. Fox-Davies for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was charged, together with another Italian, with the theft of a pair of field-glasses from a shop. The other prisoner, Darioli, confessed his guilt, but denied that the appellant was the man who was with him at the time. The defence was an *alibi;* the appellant tendered evidence that he was ill in his home on the day the theft took place,

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EMILIO RUFINO.

Darling J.
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and desired, if necessary, to call further evidence now in support of the *alibi*. He had called one witness in support of the *alibi*, who, whilst confirming the fact that Rufino was ill in the house on the day in question, had nevertheless contradicted a statement of Rufino's that he had seen and spoken to him on that day, and counsel submitted that discrepancy did not justify the learned judge in his direction to the jury that the *alibi* was no *alibi* at all; counsel submitted he was entitled to the opinion of the jury on that point. The evidence of the prosecution which associated the appellant with the theft broke down. The only witness who identified the appellant as one of those who were in the shop on the occasion of the theft was the shop assistant, Ellor, whose evidence, as on the deposition, was read. He had stated that the glass stolen was a Zeiss glass, but the glass actually produced at the trial as the stolen glass was of a perfectly different make. The manager of the shop could not identify the prisoner, although present when the alleged theft was committed, but identified the glass produced as one that had been in his stock. Ellor had further stated that Darioli could not have taken the glass without his seeing him, and that Rufino was nearest to it, but it was submitted that this evidence given in relation to a Zeiss glass which was not stolen did not apply to the Busch glass which Darioli identified as being the one he did actually steal himself. If Darioli's evidence was accepted for the identification of the glasses, then it was good to establish the *alibi*, but if Ellor's evidence was accepted to identify Rufino, then he was only identified in relation to a pair of glasses which were never stolen. The learned judge, in summing up, wrongly left to the jury his very strong personal belief in the appellant's guilt; and he also left to them hearsay evidence offered by the manager that the assistant had subsequently told him that he made a mistake when he said that the glass stolen was a Zeiss glass. Three times the learned judge told the jury that the *alibi* was impossible. Appellant had a right to have the jury's opinion on this point.

Heddon, for the Crown. The inadmissible evidence was given in answer to a question put to this witness in cross-examination by counsel for the defence. He submitted that there had been no miscarriage of justice.

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BANKES J.: The prosecution must always prove its case by admissible evidence. It cannot bridge a gap in the evidence by the explanation of counsel or judge as to what a witness might have said. The difficulty in this case was the absence of the prosecution's principal witness. The evidence of the manager about his conversation with the shop assistant was inadmissible, and the judge should have directed the jury that the prosecution had not fully made out their case. Instead of that, he himself tried to bridge the gap by explaining what the witness might have said. The misdirection was one which was likely to mislead the jury, and the conviction could not stand. But the real defence which was set up by the learned counsel for the appellant was an *alibi*. That was a question for the jury. But the learned judge expressed himself very forcibly, saying, "here is a man who has set up an *alibi* which is no shadow of an *alibi* from any possible point of view." We feel that, having regard to this direction, and to the missing link in the chain of evidence, the Court cannot allow this conviction to stand. At the same time, the Court feels that this is one of those cases where a prisoner is released owing to a technicality. The appeal, therefore, will be allowed, and this conviction quashed.

"As a part of the judgment" the Court directed the prisoner to be tried on another indictment.

Conviction quashed.

N. B.

ROBERT MESSER.

Fraudulent conversion within s. 1 (1) (*b*) *of* 1 *Edw.* 7, *c.* 10, *the Larceny Act*, 1901, *is not confined to misappropriation where there is a contract between the prosecutor and the prisoner.*

This was an appeal from conviction on a point of law, and an appeal from an order of Lord Coleridge J. refusing leave to appeal against conviction and sentence.

The appellant was convicted at the Central Criminal Court on October 18th, before the Common Serjeant, of fraudulent con-

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version of £6 3*s.* 6*d.*, and sentenced to six months' imprisonment with hard labour.

C. W. Kent for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was the driver of a taxi-cab, and was indicted under the Larceny Act, 1901 (1 Edw. 7, c. 10, s. 1, sub-s. 1 (b)) for converting to his own use a sum equal to 75 per cent. of the takings of the cab for a week in August last. He took the cab out from the proprietor by the day (although it must be admitted that in this instance he kept the cab out for seven days, and paid in nothing), and had made no special contract with the proprietor; nor was he, it was admitted, in the relation of servant to master, so that *Solomons* (1909), 2 K. B. 980; 79 L. J. K. B. 8; 101 L. T. 496; 73 J. P. 467; 25 T. L. R. 747; 2 Cr. App. R. 288, is distinguishable. He got no wages, but the prosecution alleged that he was to retain twenty-five per cent. of the takings. There must be some kind of contract before the charge for converting money had and received to another's use would lie. Here there was no evidence of a contract, and appellant had not signed any document in which he promised to pay over 75 per cent. of the takings of the cab to the cab owner. It had been held by the House of Lords in *Smith* v. *General Motor-Cab Co.*, (1911) A. C. 188; 80 L. J. K. B. 839; 105 L. T. 43; 55 S. J. 439; 27 T. L. R. 370, that the relation of taxi-cab owner and driver is that of bailor and bailee. It is a question of fact in every case whether there is a contract.

[BANKES J.: There might be a contract implied from the facts of this case and customary usage.]

On the question of sentence, appellant had been in prison two weeks before the trial came on; and this was the first conviction against him.

Bassett Hopkins, for the Crown, was not called upon.

DARLING J.: There is no necessity for the relation of master and servant to apply where a person is charged under this section of the Larceny Act with fraudulent conversion. *Solomons's case*

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ROBERT MESSER.

Darling J.

has no application. It had been appellant's practice to sign a sheet stating that he took the cab out in good order, and on the other side of the sheet were printed the conditions of payment to the proprietor. The admission by the appellant in cross-examination that he regularly paid over 75 per cent. of his takings to the proprietor of the cab, after deducting 25 per cent., and the evidence of the day-sheet, were enough to justify the jury in convicting. The case was properly left to the jury by the Common Serjeant. Sentence may run from the date of conviction.

Appeal dismissed.

N. B.

GEORGE ROLAND WILLIAMS.

Severity of sentence.

This was an appeal against sentence, on leave granted by Lord Coleridge J. Appellant (who was not present) was convicted before the Deputy-Chairman at the Knutsford Sessions of obtaining money by false pretences and sentenced to five years' penal servitude, on October 16th.

E. Owen Roberts, for the Crown, was not called upon.

HAMILTON J.: The appellant's record is very bad; he commenced a career of fraud in 1888, and has been twice convicted of forgery. But on this occasion he only got 3*s.* by the false pretences, and it was rather excessive to inflict the maximum penalty for such an offence. The appellant, who had recently been released from Dartmoor prison, pretended that he was a warder there, and that he expected money from the prison, and thereby obtained a loan of 3*s.* from the police-court missionary. He is 64 years of age. There should be some proportion between the punishment and the crime, and the sentence must be reduced to eighteen months' imprisonment with hard labour.

Sentence reduced.

N. B.

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Darling J.
Hamilton, J.
Bankes J.

THOMAS WRIGHT (*a*).

Sentence reduced on the ground of youth.

Appellant pleaded guilty at Rotherham Borough Sessions on October 10th, 1911, to several indictments for burglary, and was sentenced to seven years' penal servitude. He now appealed against this sentence by leave of the full Court.

Appellant in person said that he was only nineteen years of age, and was led into his present offence by his brother.

Horace Wilson for the Crown.

Darling J.: Appellant pleaded guilty to several burglaries, to which he says that he was instigated by his brother. He was sentenced to seven years' penal servitude; hitherto he had only been sentenced to three months', four months', and six months' imprisonment. The learned Recorder has reported to us that he did not realise that appellant was only nineteen years of age, as the fact is; his appearance and the details of his burglaries led the learned Recorder to think that he was a man of maturer years, and that he had irrevocably devoted his life to the profession of a thief. We have inquired whether he is a fit subject for the Borstal treatment, but it has been reported to us that he has already undergone that treatment in a modified form at Wakefield, and it is doubtful whether he would profit by it. The sentence will therefore be reduced to three years' penal servitude. We shall suggest to the Home Secretary that he should consider whether he should, as he can by order, have him transferred to a Borstal prison, where he will be taught a trade, and given a last chance of reforming himself.

Sentence reduced.

A. S. C. C.

(*a*) See p. 37, above.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE BANKES.

THOMAS CHAPMAN.

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20 *November.*

The identification of a suspected person must be carefully conducted; it is wrong to point out the suspected person and ask "Is that the man?"

This was an appeal against conviction, by leave of Lord Coleridge J. Appellant was convicted on June 29th, 1911, at Hereford Assizes, of having carnal knowledge of a girl under thirteen years of age, and sentenced by Lawrance J. to five years' penal servitude.

F. O. Langley for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The girl Alice Clarke was a child of eight, and the question at the trial was the identity of the prisoner. The girl was not examined on oath. She admitted that the first occasion on which she saw the prisoner after the offence was at the police court. On that occasion someone pointed to the prisoner and said, "Is that the man?"—to which she said, "Yes." This was the only identification of the prisoner, as being the assailant, by Alice Clarke. The same applies to her little sister, Lucy Clarke, who was 6 years of age, and also not examined on oath. The only further direct evidence produced by the prosecution was that of Albert Clarke and McCormick, two boys of 11 and 15 respectively, who did undoubtedly see the man, whoever he was, who committed the offence. In the case of neither of these boys was a method of identification adopted fair to the appellant. It was the fact that the whole company of militia, in which appellant was a private, were paraded man by man before the boy Clarke, and Clarke then failed to identify the appellant.

The appeal did not rely on the fact that Clarke then failed

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THOMAS CHAPMAN.

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to identify appellant, but did use that failure as a reason for shewing that the later identification of appellant by Clarke, in answer to a leading question, "Is that the man?" was useless. Clarke could not identify appellant, when he was not directed. Therefore his identification, when directed, is useless. And finally, there remained McCormick; he had in fact looked at the appellant for fifteen minutes, while waiting in his tent, and had failed then, on his own admission, to identify the appellant as the assailant. It was only at a later moment, and in answer to a leading question, "Is that the man?" that McCormick first identified him. The evidence of the little girls, not being on oath, must be corroborated in some material particular by evidence implicating the accused. The learned judge at the trial, though mentioning the evidence in his summing up, did not make sufficiently clear to the jury the importance of weighing the evidence of Clarke and McCormick, as being the only corroborative evidence implicating the accused, which if they did not accept, the appellant was not liable to be convicted on the unsworn evidence of the little girls. Indeed, the judge actually misdirected the jury, by the suggestion that the evidence of the doctor, which only shewed that the offence had been committed and did not implicate the appellant, was sufficient corroboration to satisfy the statute.

The prosecution had attached great importance to the fact that the prisoner had shaved off his moustache. The case was opened that this was done on Sunday night, the day the offence was committed, and the inference was suggested that the appellant shaved immediately to avoid the possibility of detection. But the evidence for the prosecution did not fully bear out the opening statement, and the appellant called evidence to shew that he did not shave till Monday night, and shaved then because he had burnt one side of his moustache in lighting a cigarette. The judge misdirected the jury in telling them that the time when the appellant shaved was immaterial.

The immediate shaving was urged as a matter of suspicion. The time of the shaving is important from that point of view. It comes to this, that the only thing against him is that he shaved off his moustache.

T. P. P. Powell, for the Crown, pointed out discrepancies in the evidence as to appellant's shaving off his moustache; prisoner

did not know which side was burnt; there was a conflict of evidence whether this was done on Sunday or Monday, but it made a serious difference if this was done on the Sunday or the Monday, and in either case he had the same motive for concealment.

[DARLING J.: Was there any evidence that a cigarette could so burn a man's moustache?]

No; it was assumed.

In all the circumstances, there could have been no better identification than there was, seeing that he had taken steps to conceal his identity.

Alice Clarke said she knew prisoner by his talk; she would have heard him plead.

[DARLING J.: She would have heard his evidence at the police-court.]

He was identified by the two little girls who were witnesses at the police-court.

Prisoner's counsel put the point as to identification forcibly before the jury.

The LORD CHIEF JUSTICE: The facts in this case are special and unusual. The girl was outraged on the Sunday; there was no identification on Sunday or Monday; the arrest was on Tuesday, and there appears to have been no ground for it except the prisoner's shaving off his moustache after the event. This was suspicious, but I am satisfied that this was the only ground. The only real corroborative evidence in the case is that of the two boys, McCormick and Clarke, bearing in mind the statutory requirement as to special corroboration. We do not attach importance to the failure to identify when the whole company marched past, but the prosecution rely on further identification. One of the boys is taken to the tent where the prisoner was. The boy thought it was another man. Later on both the boys were taken to the guard tent, where prisoner then was, and where there was only one other man besides prisoner. The police-sergeant asked, "Is that the man?" That is not a satisfactory way of identification, whether

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THOMAS CHAPMAN.

Lord Alverstone C.J.

the persons identifying were young or old. It is not right to point out and ask questions in this way. The usual and proper way in such cases is to place the suspected man with a sufficient number of others, and to have the identifying person pick out a man without assistance. Although identification is difficult, this method does strengthen it. Lawrance J. told the jury that they must ask themselves if the identification was sufficient. We do not think this a sufficient direction. He should have pointed out that the boys, having both failed earlier to identify, had only acquiesced in a suggestion rather than positively identified. In these circumstances we are not satisfied with the identification, or that there was sufficient corroboration of the evidence of the little girls implicating the accused, and therefore the conviction cannot stand.

Conviction quashed.

E. A. W.

ERNEST GEORGE WOOD.

On an indictment under s. 57 of 24 & 25 Vict. c. 96, the Larceny Act, 1861, the jury may find the felonious intent from the circumstances.

This was an appeal by leave of Hamilton J. against conviction and sentence. Appellant was convicted of housebreaking, at St. Albans Quarter Sessions, on October 17th, 1911, and was sentenced by the Deputy-Chairman to fifteen months' imprisonment with hard labour.

E. H. Tindal Atkinson for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant is charged with housebreaking under s. 57 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), under which section the breaking must be done with the intent to commit a felony in the house. &c. The house was a gentleman's house with a front door and a door opening on a verandah, both of which were admittedly latched, but not locked. The principal witness was prosecutor's chauffeur, who said he found the appellant standing in the hall about 6.15 p.m., and when spoken to, appellant said he was canvassing

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ERNEST GEORGE WOOD.

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for orders for coal on behalf of Messrs. Wood. It only appeared from the chauffeur's evidence that the appellant was standing in the hall. Wood's manager said in chief that appellant had never been employed by them, but did not deny when appellant produced an agreement of 1906 that he had been employed then, and it appeared that only the 1910 books had been looked through. It is true that the manager said agents had no right to go to Harpenden (where the alleged offence was committed), and that the name of a canvasser who did no business for six months was cancelled. Appellant, on arrest, said he was getting orders for coal. He had on him a boot-maker's hammer and outfit, the possession of which he explained. These are not burglarious; he wanted work as a bootmaker, and was an agent for coal in his spare time. He called for orders, knocked several times, waiting for ten to fifteen minutes. He had plenty of time to steal if he had wanted to. The agreement with Woods and order forms and bills were put in.

In the summing up one point bore unfairly on appellant, in that the Chairman said that he was telling a false story. The Chairman said the question was whether there was an honest intent, and the law cast on appellant found as described the onus of shewing why he was there. The Chairman could not thus shift the onus of proof as a matter of law on to the appellant. If it is found against me that that direction was intended as a matter of fact and not of law, I rely on the failure of the prosecution to prove intention as part of the offence.

It was not fair to say it was not true that prisoner was an agent; the Chairman should have put appellant's case, for there was a question in issue there. It was not fair to put such a duty as he did on the prisoner. *Pearson,* 74 J. P. 175; 4 Cr. App. R. 40 (1910), involving an offence under s. 54, is in point, although there it was not necessary to prove breaking. In the present case the worst that could be said was that prisoner was found in the hall. If he were canvassing that would have negatived any felonious intent.

As to sentence, fifteen months' imprisonment with hard labour was heavy; for ten months after his release from a substantial term he had only been convicted twice for begging.

R. E. Moore for the Crown, was not called on.

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ERNEST GEORGE WOOD.

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BANKES J.: Appellant is charged under s. 57 of the Larceny Act with breaking and entering a dwelling-house with intent to commit a felony. The evidence was that the front and verandah doors were closed, and there was therefore evidence on which the jury could have acted that there was breaking in. Appellant says there was no proof of intent, and that there was serious misdirection. As to the paragraph complained of in the summing up, if the Chairman had so expressed himself as a matter of law, it would be different, but it was a mere common sense statement. The appellant was found in the front hall in fact. In these circumstances the jury would be entitled to find intent if prisoner gave no satisfactory explanation. It was years since he had been an agent for coal. He also said he went to the house and walked in after trying to attract attention by ringing the bell for some time. No one heard any bell. It was perfectly open to the jury to find felonious intent. Sentence may run from date of conviction.

Appeal dismissed.

E. A. W.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HAMILTON, AND MR. JUSTICE BANKES.

MARGARET MELLEN HOLDER. 1911 27 *November.*

Mitigation of sentence in view of fresh evidence.

The prisoner was convicted of larceny, on November 2nd, at Exeter Assizes, before the Lord Chief Justice, and sentenced to eighteen months' imprisonment with hard labour She appealed against conviction and sentence. (At the sitting of the Court the Lord Chief Justice was not present, Mr. Justice Darling being the third judge; but upon new facts appearing which made for a mitigation of sentence, Mr. Justice Darling stated that he would ask the Lord Chief Justice to take his place, hear the new facts, and pass such sentence as he would have passed had all the facts been before him at the trial. This course was adopted, and the appeal was re-heard before the Court thus constituted.)

The LORD CHIEF JUSTICE asked appellant's counsel to deal with the case as if he was pleading in mitigation of sentence at the trial, so that he might, with the assistance of the Court, reconsider his sentence.

Holman Gregory, K.C. (with him *W. T. Lawrance*) for the appellant, who was not present. Prisoner was only 20 years of age, was in delicate health, and highly neurotic. While she was visiting a Mr. and Mrs. Baines, with whom she was on good terms, two rings and two sovereigns were missed by them, but prisoner was not at the time suspected. Some days later (June 11th) she spent a day with the Baines; on this occasion she took some silver plate, put it in a cardboard hat-box, and sent it to the railway station.

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She was charged with the theft, and denied that she knew the contents of the hat-box. She suggested that the plate had been put in the box by Mr. Baines in order to trap or coerce her. At the police court she insisted on this defence, and instructed her legal advisers to press it. Counsel had gone into the evidence and had formed a strong opinion about this defence. On his advice, the prisoner now withdrew it, and apologised for having made the charge against Mr. Baines. That being so. he withdrew the appeal against the conviction.

As regards the sentence, he had learned from the mother of appellant that morning that the prisoner's father had been in a lunatic asylum for some time before his death.

In the circumstances, he asked the Court to modify the sentence.

J. A. Hawke, for the Crown, was not called upon

The LORD CHIEF JUSTICE: I think that I ought to correct a misconception which is very prevalent on the part of some well-meaning persons, that first offenders who are sent to prison become the associates of hardened criminals. That is not a fact; first offenders are kept separate from other criminals. Now with regard to this case, we do not see our way to let the prisoner go unpunished with a sentence of imprisonment. The crime was very ingenious, carefully planned and skilfully executed. To say that the prisoner was insane in the legal sense of those words was impossible; nor had it been suggested at the trial. To say that she ought to escape punishment because she was educated or refined was a doctrine to which judges cannot give effect. But the new fact now ascertained—namely, the lunacy of the prisoner's father—and the state of her health were circumstances which could legitimately be considered in assessing the measure of punishment. The Court, accordingly, would do that which he would himself have done had this fact been before him at the trial; the sentence would be reduced to twelve months' imprisonment in the second division, to run from the date of conviction.

Sentence reduced.

Solicitors for the Appellant—*Mann and Crimp,* for *Kitsons, Hutchings, Easterbrook & Co.*

J. H. M.

BEATRICE LEVY.

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Acts intended to destroy or conceal things which may be produced in evidence against a prisoner on his trial, make the doer an accessory after the fact, of whom the correct technical description in an indictment is expressed by the words "receive, harbour and maintain."

This was a case stated by the Common Serjeant of the City of London. The appellant was convicted on November 14th. The case was (so far as necessary for the purposes of this report) in the following terms:—

"This woman was tried before me with a man George Green on an indictment charging them with the felonious possession of a mould for coining counterfeit florins—and in another count Levy was charged with the felony of being an accessory after the fact to the said felony committed by George Green. Levy was acquitted on the charge of being in possession of the mould. Green was convicted on that count.

"There was evidence that Levy, after Green's arrest, for the purpose of preventing his being convicted, removed from a workshop occupied by him a number of fragments of other coining moulds and other things such as would be used in making counterfeit coins, and which were adducible, and which were in fact produced, in evidence against him. I doubted whether these acts on the part of Levy were sufficient to support the count for harbouring and maintaining Green, the principal felon. But I directed the jury that if they were satisfied that she removed the things from Green's workshop knowing that he was guilty of committing a felony charged against him, and did so for the purpose of assisting him to escape conviction, they should find her guilty. The jury found her guilty, and she was sentenced to three months' imprisonment with hard labour.

"The question for the Court is whether this direction was right. See *R.* v. *Butterfield*, 1 Cox C. C. 39 (1843)."

A copy of the count was appended to the case and was in the following terms:—

"The jurors aforesaid upon their oath aforesaid do further present that Beatrice Levy and . . . . well knowing the said George Green to have done and committed the said felony in form aforesaid afterwards, to wit, on the day and year aforesaid, him the

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said George Green did feloniously receive, harbour and maintain against the form of the statute, &c."

F. Watt for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. This case must be distinguished from *Butterfield* (above), for the words of that indictment were different; it ran: "receive, harbour, maintain, relieve, aid, comfort and assist." Maintaining and harbouring must mean more than merely getting rid of evidence: there must be direct personal assistance. There are two difficulties in supporting this conviction—

(1) There is no such personal assistance as is necessary to sustain the offence;

(2) And even if there is, the indictment does not allege "assistance."

The word "maintain" is *ejusdem generis* with "receive and harbour"; it means some aid to the person of the prisoner, not some aid to his cause. The word is used differently in civil and in criminal cases. This view is supported by *Chapple*, 9 C. & P. 355 (1845); 3 Coke's Institutes, 138, 139; Hawkins's Pleas of the Crown, book ii. c. 29, s. 26 (vol. 4, ed. 1795); and *Greenacre*, 8 C. & P. 35 (1837).

Beaumont Morice for the Crown. The direction was right; it followed substantially that in *Butterfield*.

(1) "Assist" is no longer necessary in the indictment; "receive" is a term of art with a technical meaning; it includes all that used to be covered by the words "comfort and assist," which, therefore, are now omitted as superfluous.

(2) "Receive and maintain" include any assistance whatever given to a felon to hinder his apprehension, trial or punishment. "The hindrance of public justice by assisting the felon to escape the vengeance of the law" is the offence here (4 Black. Comm. 38).

The LORD CHIEF JUSTICE: The conviction must be affirmed. For many years the words "receive, harbour and maintain" have been used to describe the offence of being an accessory after the fact to a felony; they have come to be the correct technical description of it (whatever may be the exact meaning of "harbour"). The test is correctly described in Hawkins, book ii. c. 29, s. 26,

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where it is stated that "generally any assistance whatever given to one known to be a felon in order to prevent his being apprehended, or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose." Here the indictment is in proper language, and the conviction was right. The case must be answered in favour of the Crown.

Conviction affirmed.

J. H. M.

JAMES MORGAN.

Proviso to s. 4 (1) *of the Criminal Appeal Act applied, despite a misdirection on the law.*

The prisoner was convicted of larceny, before the Recorder of Liverpool, at Liverpool Quarter Sessions, on October 5th, and sentenced to six months' imprisonment with hard labour. He appealed against the conviction, by leave of the full Court, on the ground of misdirection.

The prisoner had taken and sold certain furniture belonging to a lady of his acquaintance, Miss Bagnall, and had used the proceeds for the purposes of his business. The lady denied that he had any authority to sell the furniture, and also that he had any authority to use the proceeds in his business. The prisoner's story and hers contradicted each other, and the prisoner's wife, whom he called as a witness on his own behalf at the trial (where he was undefended), and whom counsel obtained leave to call on his behalf in the Court of Appeal, did not give any evidence which supported the prisoner's story that he had authority to sell the furniture. During the trial the prisoner was repeatedly ordered by the Recorder to confine his cross-examination to the question whether or not he had authority to sell the furniture; but, notwithstanding this direction, the Recorder, in his summing up, told the jury that the prisoner was equally guilty "if he sells the property without authority, or sells it with authority but converts the proceeds to his own use without authority to do so."

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G. C. Rees for the appellant, who was present, took two points. First, that the judge so harried and hustled the prisoner while conducting his own defence as to render it impossible for him to conduct his own case. Secondly, that the words quoted above amounted to misdirection, since there was no count or indictment which charged the prisoner with larceny of the proceeds of the sale.

Harding, for the Crown, did not defend the alleged misdirection, but said that in substance the case turned on whether or not the prisoner had authority to sell the goods, and the jury convicted him because they believed he had none.

The LORD CHIEF JUSTICE: In this case, if we had any doubt as to what the jury would have done on a proper direction by the Recorder, we should have quashed the conviction, since this Court is not here to re-try cases improperly tried below. But if we are convinced that on a proper direction the jury must have come to the same conclusion as they did upon the direction actually given them, then there is no substantial miscarriage of justice, and it is our duty to affirm the conviction, even although the point raised in the ground of appeal is determined in favour of the prisoner. Even though we may consider that the Recorder gave a wholly wrong direction to the jury when he used the words, "if he sells the property without authority, or sells it with authority but converts the proceeds to his own use without authority to do so, he is equally guilty," we are convinced that on the facts a jury properly directed would have given the same verdict, we must uphold the conviction. Sentence may run from the date of conviction.

Appeal dismissed.

Solicitors for the Appellant—*Quilliam & Son,* Liverpool.

J. H. M.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HAMILTON, AND MR. JUSTICE BANKES.

CHARLES COLEMAN.

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When a defence of insanity is set up the judge is not bound to direct the jury that they may find a special verdict, it is sufficient if he directs them clearly that the issue is whether the prisoner is sane or insane.

This was an application for leave to appeal against conviction. Appellant was convicted on November 21st at the Hertford Assizes, before Mr. Justice Lawrance, of wilful murder, and sentenced to death.

Alfred Taylor for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. Appellant was convicted of the murder of Rose Anna Gurney, and the only defence raised at the trial was that he was insane at the time. The appellant was subject to delusions, and had on several occasions threatened and attempted to commit suicide. Some time since his nephew was drowned; the prisoner had himself taken him out of the water, and evidence was given that he had never been the same since. In 1897 he was convicted of unlawful wounding, and he was then examined by Dr. Parker. Dr. Parker gave evidence at the trial that in 1897 he had formed the opinion that the prisoner was of unbalanced mind, and that his condition was likely to get worse. The murder was committed on the very day on which the prisoner was released from serving a sentence of six months' imprisonment for mutilating a dog under circumstances which pointed to insanity. Moreover, the number of wounds which he inflicted on the murdered woman suggested that it was not the act of a sane person. The prisoner made four statements on the day of his arrest, but none of them pointed to proof that

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he knew what had been done; they suggested rather that he had no consciousness of the act. His brother gave evidence that after committing the crime of unlawful wounding in 1897, he attempted suicide. This was a fact, but the jury may have doubted it, as a police inspector said he had no knowledge of it. It is true that evidence was given that before the crime of 1897 the prisoner had been drinking heavily, but his subsequent history points to something more serious than excessive drinking.

The judge made no reference in his summing up to the absence of motive; this is a question of great importance; see *Layton*, 4 Cox C. C. 149 (1849). The omission, when there was other evidence of insanity, amounts to misdirection.

Further, the judge did not tell the jury that they were at liberty to find a special verdict, and although he directed them that they must decide whether the prisoner knew the nature and quality of the act, he failed to direct them on the latter part of the test laid down in *M'Naughton*, 4 St. Tr. (N.S.) 847; 10 Cl. & Fin. 200; 1 C. & K. 130; 8 Eng. R. 718; 8 Scott. N. R. 595 (1843), as to whether, if he did know the nature and quality of the act, he knew that what he was doing was wrong.

The judge made various mis-statements in his summing up. Referring to previous convictions, which I had brought out in cross-examination, he said the answer to all of those charges would be the same as that now set up, whereas I only suggested insanity in connection with the first crime in 1897. The defence of insanity was not set up then, but the prisoner was undefended. The judge quoted Dr. Parker as saying, "I do not say he is of unsound mind," but what he said was, "I am not in the witness-box to say he is of unsound mind, but to give my recollection of what happened thirteen years ago." Dr. Parker had no opportunity of examining the prisoner for the purposes of this trial. Misdirection as to his evidence reduced it to a nullity.

Theobald Mathew and *Holford Knight*, for the Crown, were not called upon.

The LORD CHIEF JUSTICE: There is no doubt as to the facts in this case, and there was evidence to show that the prisoner was conscious of what he had done. The only point for the defence was Dr. Parker's opinion as to the prisoner's sanity at the time

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of the previous trial. Dr. Dyer, the prison doctor, had had the prisoner under daily observation since September 5th, and his evidence is an answer to that of Dr. Parker. The jury had the evidence of both doctors before them, and knew that the prisoner had committed extraordinary crimes. The judge put the matter quite clearly to the jury, although he was possibly in error in thinking that Mr. Taylor suggested insanity in all the previous crimes, but the matter was fresh in the minds of the jury. The judge went through the evidence of all the witnesses for the defence, as well as that of Dr. Dyer, and finally put the issue to the jury that they must be satisfied as to the prisoner's sanity. This was most favourable for the prisoner, as he might have told them that the onus was on the defence to prove insanity. There was ample evidence to justify the verdict of the jury. Whether the Home Secretary sees fit to make further enquiries is not a question for us.

Application dismissed.

A. L. B. T.

THOMAS MASON.

On a trial for homicide, an expert medical witness, who has not seen the dead body but has heard its condition described in the witnesses' evidence in Court, may state his opinion that death was not self-inflicted.

This was an appeal on a point of law against conviction. Appellant was convicted on November 16th at the Stafford Assizes, before Mr. Justice Pickford, of wilful murder, and sentenced to death.

Milward for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of the murder of Sarah Sturdy, a young woman to whom he was engaged. Being both out of work, they left their homes and wandered about together for about forty-eight hours. On the second day they came at a late hour to an eating house, where the girl was seen to be crying, and the man comforting her. The next day the girl's body was found in the verandah of a cricket

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pavilion, stabbed to the heart, with the prisoner's knife still in the wound. The prisoner gave himself up to the police and made incriminating statements. In a written statement which he handed to the magistrates, and in evidence at the trial, he stated that the deceased had committed suicide. Dr. Jessop examined the body of the deceased and made careful notes as to the position of the body, the nature of the wound, &c., with a view to forming an opinion as to whether death was caused by suicide or homicide, which was the only issue in the case. He gave these particulars in evidence, and stated that in his view the wound was not self-inflicted. Mr. Pepper, the Home Office expert, was called to give evidence founded on what he had heard in Court. I objected to his evidence, but it was admitted, which is the ground of this appeal.

I submit that expert evidence, founded only on what the expert has heard, cannot be admitted to decide the very issue which the jury have to try; see *Frances*, 4 Cox C. C. 57 (1849). This was the issue in this case as it was conducted; the prisoner stated that no one was present but the deceased and himself, so the possibility of a third person having inflicted the wound was excluded.

If the evidence of the expert was admissible at all, the question was put to him in the wrong form. He might be asked whether assuming certain facts, they were indicative of the wound being inflicted by an assailant, or general questions as to the possibility of the wound being inflicted by an assailant, but not whether the wound was so inflicted, which is the issue to be tried by the jury. Here the question asked was, "Is it your opinion that the wound was inflicted by a person other than the deceased?" and he answered, "Certainly." This was a leading question, and not the proper one to put in the circumstances. The only case I can find on the point is *Shaw* (1834; MS., C. S. G.), referred to in the 7th edition of Russell on Crimes, p. 2262, and also reported, but not on this point, in 6 C. & P. 372, but it is not in my favour. See also Archbold's Criminal Pleadings, 24th ed. p. 452.

Cranstoun and *Brice*, for the Crown, were not called upon.

The LORD CHIEF JUSTICE: The question raised is whether the

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evidence of an expert is admissible when he has not seen the body, but has only heard the evidence of those who have. The point as to the form of the question was not taken at the trial; one question was put in rather a leading form, but coming at the end of Mr. Pepper's evidence, the point is unimportant. He was not asked the very question which the jury had to decide, since the possibility of a third person having been the assailant was only excluded from the case by other evidence. The proposition is rightly stated in Archbold, at p. 452—"So, upon an indictment for murder, the deceased's wounds, &c., being described, a surgeon may be called upon to give in evidence his opinion whether the deceased died in consequence of his wounds, or from natural causes." There is no difference in principle as to a question of death from natural causes and death occasioned by injuries self-inflicted. The evidence was clearly admissible, and was rightly dealt with in the summing up as an opinion based on an assumed state of facts.

Appeal dismissed.

A. L. B. T.

WALTER CHARLES DEANE.

The Court will not entertain a defence which was not, but which could have been, set up at the trial.

This was an appeal against conviction and sentence, by leave of the full Court. Appellant was convicted at the County of London Sessions on October 26th, on an indictment charging him with causing grievous bodily harm to Mary Ann Shelton, with other counts for causing actual bodily harm and for common assault, and was sentenced to three months' imprisonment in the second division.

Arthur Bryan for the appellant, who was present. Appellant is a medical student and is a married man. On March 29th, Shelton entered his service as a domestic servant, and ten days later she gave notice. On April 29th a dispute arose as to the amount of wages due to her. The case for the prosecution was

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that later in the day Shelton went to her mistress to settle the dispute, and that the appellant ejected the girl, deliberately throwing her down a flight of stone steps in front of the house, with the result that her leg was fractured in the fall.

The case for the prisoner, who was not represented at the trial, was that he found Shelton creating a disturbance in the drawing-room, upsetting his wife, who was an invalid. He put his hand on her shoulder to eject her from the room, when she struck him in the face with her open hand. She tried to go upstairs, but was prevented by the prisoner, and she then went out of the front door and stood on the second step from the top, abusing him; he shut the door, and did not know she had fallen until he was informed of the fact by a police constable.

The jury returned a general verdict of guilty, but added that the prisoner acted under great provocation; that he ejected the girl from the house, but had no intention of causing her harm. The judge should have directed them that the prisoner had a right to eject Shelton so long as he used no more force than was necessary. Since it was not done before, it should have been put to the jury after their verdict. The general effect of the summing up caused the jury to believe that, if the girl was ejected and injury resulted, they were justified in finding the prisoner guilty; they ought to have been warned against this, for, where the finding of a jury negatives malice, a conviction will be quashed. *Pembliton*, L. R. 2 C. C. R. 119; 43 L. J. M. C. 91; 30 L. T. 405; 22 W. R. 553; 12 Cox C. C. 607 (1874). Moreover, a conviction on either of the two minor counts can only be sustained if the prisoner was doing an unlawful act. It was clear that he was doing a lawful act in ejecting the girl, provided he used no more force than was necessary, and that question was never put to the jury.

C. Haward Pierson, for the Crown. The only defence raised was an absolute denial of Shelton's story, which was supported by two independent witnesses. The prisoner must be presumed to intend the reasonable and probable consequences of his action.

HAMILTON J.: The only question raised in this case is in what circumstances Shelton was pushed out of, or left the house. The only defence raised by the prisoner was a denial that he ejected

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the girl at all, although the Deputy-Chairman gave him an opportunity of raising alternative defences. No objection is taken to the summing up as the case was put, and the jury returned a verdict which was clearly one of guilty on the second count. It is suggested that the Deputy-Chairman should then have told the jury that if the prisoner ejected the girl (which he had denied doing), and if in so doing he used no more force than was necessary, it was competent for them to deal with this as a defence, though it had not been raised. As this case had never been made by the prisoner, and he had a fair trial on the issue he raised, he cannot complain.

Appeal dismissed.

Solicitor for the Appellant—*C. Hamilton Hill.*

A. L. B. T.

GEORGE LOAKE.

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Where a defence of insanity has been left with a proper direction to the jury at the trial, the Court will not act upon fresh evidence tendered to prove insanity unless legal insanity be clearly proved; the suggestion that appellant's family history points to insanity in his case should be made to the Home Secretary.

This was an application for leave to appeal against conviction and to call further evidence. Appellant was convicted of murder at the Stafford Assizes, on 20th November, 1911, and sentenced to death by Pickford J.

R. J. Lawrence for the appellant, who was present. The defence in this case was that of insanity, and I desire to call evidence that two of the prisoner's brothers were insane. This fact was not known to me, nor to the solicitor instructing me at the time of the trial. Also I wish to call Mr. Lavender, a magistrate who saw the prisoner in the cells on the day on which he appeared before the magistrates, and who formed an opinion as to his mental condition, Ingle, a friend of the prisoner, who saw him three days before the murder, and also formed an opinion, and Dr. Martin Fox, who saw the prisoner shortly after the murder, and who made a communication to the police, which they did not make known to the defence.

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[The LORD CHIEF JUSTICE: You may call witnesses to prove family insanity, and Dr. Martin Fox. Ingle's evidence is clearly inadmissible, and Mr Lavender is not an expert.]

John Loake, called and examined by *Lawrence:* I am a grocer's assistant, aged 26, and a son of the prisoner. My father's brother, William, died some years ago. I never saw him; I have heard my mother say that he was an imbecile, and that he died at the age of 36. Another uncle, Charles, a younger brother of the prisoner, is now an inmate of the Warwick County Asylum, Hatton.

Cross-examined by *Hazel,* for the Crown: I was called at the trial to give evidence of my father's insanity. I did not mention these facts to the solicitor for the defence; I was too worried. I had some ideas about it, but got to know definitely three or four days after the trial. I never heard that the uncle who is dead was in an asylum; he ran at my mother with a chopper; he was subject to epileptic fits.

Samuel Alfred Newman, called at the request of the Court, and examined by *Lawrence:* I am a solicitor practising at Walsall, and I was instructed three weeks before the trial to defend the prisoner. I saw the last witness and other members of the family; none of them mentioned lunacy in the family. I first heard of it on 26th November. I have made no inquiry at the Asylum, nor as to the brother who is said to have died an imbecile.

Cross-examined by *Hazel:* It did not occur to me to ask if there was insanity in the family.

George Martin Fox, called and examined by *Lawrence:* I am a fully qualified medical man, and have been for eighteen years medical officer to the Walsall Union, where I have had experience in lunatics. I was summoned to the hospital half-an-hour after the murder, and examined the prisoner, who had superficial wounds on his throat. He seemed gloomy, depressed, and indifferent to what he had done. He was staring vacantly in front of him; I thought it wise to telephone to the inspector at Walsall police station, suggesting that he should have the prisoner

watched in the cells for fear of suicide. I did not think it proper to cross-examine the prisoner; from his manner I hesitated whether he was of sound mind. Attempted suicide may be a sign of insanity. In cases of homicidal mania the committal of the act sometimes has a sobering influence.

Cross-examined by *Hazel:* The only question I remember asking the prisoner was whether he had murdered his wife; he said he supposed he had. My evidence is based entirely on his manner and appearance.

[During the course of the hearing a report was received by the Court from the Lunacy Commissioners to the effect that Charles Loake was admitted to the Warwick County Asylum on 2nd February, 1911, as an epileptic. No near relative was known to be afflicted with insanity.]

Lawrence: The prisoner was an engine-driver, 64 years of age, and he murdered Elizabeth Loake, his second wife, on the 7th August. The couple were living apart, mainly owing to the fact that they were destitute, the prisoner having lost his employment, but partly also in consequence of quarrels resulting from the wife having pawned the prisoner's boots—a consequence of the destitution. The murder was committed in broad daylight in the presence of a boy; shortly afterwards the prisoner was seen by a police constable quietly walking away with a small pocket-knife in his hand. Dr. Shaw, the police medical officer, examined some wounds which the prisoner had inflicted on himself, and also examined him as to his sanity. No reference was made by him before the magistrates to the latter part of the examination, but at the trial he volunteered the information that prisoner was sane before any suggestion of insanity had been made. In describing the wounds he made inaccurate statements, and his examination was of a cursory character, taking only a few minutes, and made in an open yard in the presence of various policemen and others, so his evidence generally is not to be relied upon. The proprietor of the lodging-house where the prisoner lived gave evidence that the prisoner paid him at an unusual hour, saying, "You may as well have this first as last; it will be the last," and that he bore a hunted look; and another witness

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stated that the prisoner gave him a piece of soap, saying he would not want it again. The prosecution suggested that these statements shewed that the prisoner intended to commit the murder, but such open references also pointed to insanity and intention to commit suicide. On being taken to the station, the prisoner said, "Her should have stuck to me," and to a constable who had charge of him at the inquest on the following day, "Nobody knows why I done it, only her that is gone. I won't tell anybody, not even my own children. She should not have done as she did. I didn't intend to have that done on me." The prosecution contended these statements were conclusive of motive, but the defence suggested they were at least equally consistent with insanity, no possible benefit or advantage being likely to accrue to prisoner by his wife returning to him.

For the defence it was proved that eighteen months previously the prisoner had an accident to his engine, in which he received injuries to his head, and that on the same day he attempted to drown himself in a canal. His four children gave instances of curious conduct and remarks by the prisoner shortly before the murder, and of expressed intention to commit suicide.

The contentions for the defence as to insanity were not sufficiently put before the jury in the learned judge's summing up. He stated that there was no medical evidence to prove the prisoner insane, and that all the evidence of insanity was given by members of his family, but he omitted to refer to the attempt to commit suicide eighteen months previously, to the injuries to the prisoner's head, to the incidents in the lodging-house, and to the statements to the police as being not necessarily conclusive of intention to commit murder, but at least not inconsistent with insanity and intention to commit suicide, or to the fact that both doctors had agreed that attempts to commit suicide were some evidence of insanity. He discounted the evidence of the family in stating that the sons took no steps to have their father locked up, without putting the converse question of expense and sentiment. He accepted the theory of the prosecution that the jury could not find the prisoner insane unless it was a sudden attack of homicidal mania; whereas the case for the defence was there had been a gradual growth of insanity for the last eighteen months as a result of the accident, aggravated by destitution.

He dealt with the suggested motive in the refusal of the

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prisoner's wife to return to him, but not with the contrary view that this was an insane idea, and did not put forward as matter at least worthy of the consideration of the jury the suggestion of the defence, viz., that the prisoner went to see his wife for the last time before committing suicide (if she should still refuse to come and live with him), and that her death resulted from a sudden impulse due to an insane view of the consequences of her refusal. The medical evidence was dealt with as if it was conclusive, though Dr. Shaw's evidence must be accepted with caution.

A. E. W. Hazel and *Brice*, for the Crown, were not called on.

The LORD CHIEF JUSTICE: This appeal is based on two grounds; first, that the verdict was unsatisfactory in that the jury ought to have found that, although the prisoner did the act, he was not at the time responsible according to law for his actions; and secondly, that there was misdirection by the learned judge. As to the latter, Mr. Lawrence confines his argument to two main points—that the judge's summing up did not contain a sufficient direction as to the prisoner's previous history, nor as to his previous attempt to commit suicide. No doubt Mr. Lawrence urged these considerations in his address to the jury, and although the judge has not noticed the points as fully as he might have done, had he thought fit, that is not misdirection unless the jury may have been misled. It is impossible to say there was misdirection in this case; the concluding words of the summing up specifically directed the jury's attention to the question.

A point sought to be made is that Dr. Shaw's evidence as to sanity was not satisfactory owing to the mistakes he made on other matters. These mistakes were on unimportant points, as to certain scratches, and there was no evidence that these superficial injuries pointed to attempted suicide. The question of sanity was not raised before the magistrates, but when Dr. Shaw gave his evidence at the trial it was common knowledge that this defence was to be set up. It is urged that the police evidence as to the prisoner's statements was not properly dealt with; the statements were consistent with the suggestion that he had some reason in

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his mind, based possibly on jealousy, for doing what he did. There was no misdirection as the case stood.

The Court has been asked to hear further evidence, and has done so, though the son's evidence ought to have been given at the trial. The fact that the uncle suffered from epilepsy would have been important if there had been evidence that the prisoner also suffered from epilepsy. Dr. Martin Fox only says that he thought the man ought to be watched for fear of suicide. Though suicide is sometimes evidence of insanity, many prisoners attempt suicide when there is no suggestion of anything of the kind. His evidence is wholly insufficient to justify us in disturbing the verdict.

We desire to repeat what we said in *Jesshope*, 5 Cr. App. R. (1910), that in ordinary circumstances the Home Secretary is in a better position to investigate these matters than the Court; it is not necessary to say whether any such step is desirable in this case.

Application dismissed.

Solicitors for the Appellant—*Robinson and Bradley*, for *S. A. Newman*.

A. L. B. T.

WILLIAM PARSONS.

Severity of sentence.

In passing sentence, regard should be had to the nature of previous offences.

This was an appeal against sentence by leave of Hamilton J. Appellant was convicted of housebreaking at the Stafford County Sessions, on April 14th, 1911, and sentenced to three years' penal servitude.

Appellant, in person, stated that he had pleaded guilty to stealing a box, being intoxicated at the time. In 1907 he had been sentenced to two years' imprisonment with hard labour for abduction, a quite different class of offence; all his other convictions were for minor offences. He had already served eight months of his sentence.

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F. W. Sherwood, for the Crown. It is perhaps arguable that the chief previous conviction being for so different a kind of offence, should not have affected the present sentence to the extent to which it would seem to have affected it. I am instructed not to argue to the contrary if the Court is disposed to reduce the sentence.

The LORD CHIEF JUSTICE: We are disposed to reduce the sentence, though we do not know why the appeal was not made sooner. As the previous offence was not of the same character as the present offence the sentence will be reduced to one of eighteen months' imprisonment with hard labour, to date from conviction.

Sentence reduced.

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Where there is conflicting evidence as to a prisoner's sanity, the Court will not interfere on the ground that the judge took a view against insanity if he directed the jury properly on the principles which should guide them.

This was an application for leave to appeal against conviction, and to call further evidence. Appellant was convicted at the Leeds Assizes, on the 1st December, of the murder of Ada Wilson, and sentenced to death by Horridge J.

R. J. Sutcliffe for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant and the deceased lived in the same street. At 8.30 p.m. on 30th October, the appellant left the house, which was situate a few doors away from deceased's house, and five minutes later the deceased ran into prisoner's house with her throat cut. On the 26th October he had borrowed a razor; he stated on the 28th October that Ada Wilson had "shopped him to the police." He was, in fact, taken from deceased's house to the police station on that day to be identified on a charge of larceny, but was not identified. On 30th October he stated he had fallen out with the girl, and on a witness

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advising him to make it up, answered, "I must go away." He was seen about 8.45 p.m. on 30th October running from the street where the girl lived, in a very excited state, and a few minutes later gave himself up to the police in the same condition of excitement. He afterwards made statements to the police, and wrote a letter to his sister, which pointed to his guilt. At a later date he stated that the deceased snatched the razor from him and committed suicide.

I ask leave to call a police constable to prove that in the middle of October the deceased was charged with wandering, being in a state of mind consistent with suicide, if such evidence will affect the Court's decision. The prisoner stated there was no blood on his clothes, and I should like the officer who searched him at the police station called, unless the Court will draw the inference that as no evidence was given of blood on the clothes, there was none in fact.

The defence raised at the trial was that of insanity, and evidence was given that he was strange in his manner from 26th October. He was in a lunatic asylum from October, 1908, until June, 1910, when he was discharged for a month on probation. Dr. Walker, who had charge of him at the asylum, gave evidence; he examined the prisoner on 20th November and found him suffering from delusions, confused in his mind, and treating the prospect of his trial with levity; Dr. Garden also examined him on 14th November, with similar results. In his state of mind any statements made by the prisoner incriminating himself should be disregarded, and without them there was not sufficient evidence to justify the verdict of guilty. The judge did not direct the jury properly on this point. He did tell the jury that if they thought the prisoner insane they might not think his statements worth much, but he ought to have told them that if they thought he was insane they should disregard that evidence altogether, or at the most accept it with the greatest care.

Secondly, the question of sanity within the meaning of *MacNaughton*, 4 St. Tr. (N.S.) 847; 10 Cl. & F. 200; 8 Eng. Rep. 718 (1843), should have been decided differently by the jury. The Court has power under s. 5 (4) of the Criminal Appeal Act, if it appears that the prisoner was insane, to quash the sentence, and order him to be kept in custody as a criminal lunatic. Dr. Walker gave evidence as to the prisoner's condition in the

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asylum, and stated that, though his condition improved, there was likely to be a recurrence of the insanity; on cross-examination he admitted that the disorder was not such as to cause him to expect homicidal tendencies; he also said that if the prisoner confessed to the police immediately after the deed, he knew he had cut the throat of the deceased, but that he did not think the prisoner considered it a wrong act, though he knew it was contrary to the law; that he knew it was a disgraceful act, but thought he had a motive. In any case the most the prosecution could say was that his evidence was inconsistent, in which case the evidence of Dr. Garden becomes of great importance; he states that he thinks the man did not know what he was doing. The evidence shewed that the prisoner did not know he was doing wrong.

The judge in his summing up let it appear that he had strong views against a verdict of insanity; after summing up the evidence he said, "You may think these were the symptoms of a man who was brooding over a wrong, and was going to avenge it, or of one disturbed in his mental senses. You must look on it with your common sense and say whether that is evidence on which you can safely act in being satisfied that he did not know what he was doing. . . . Is it extraordinary that he should have been excited, even if sane, on giving himself up to the police after committing murder?" Commenting on Dr. Walker's evidence, he said, "Does it mean that he really did not know the difference between right and wrong, or that he thought he had a right to take vengeance into his own hands? Lots of people think they have a motive for committing a crime." It was clear that the whole trend of the judge's mind was strongly against insanity.

Lowenthal and *Macaskie,* for the Crown, were not called upon.

The LORD CHIEF JUSTICE: This appeal is based on two grounds, firstly, that no weight should be attached to the statements of the prisoner, and that without them there was not sufficient evidence to support the verdict of guilty, and secondly, that upon the evidence the jury ought to have found the prisoner insane. On the first point the facts themselves, such as the possession of the razor by the prisoner, and the medical evidence that suicide was impossible, are quite sufficient to support the verdict, apart

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from the prisoner's statements. On the second point, the question was one for the jury under proper direction. There is no question as to there having been insufficient or improper direction on the principles which should guide the jury, and I cannot agree that the summing up shewed any disapproval of the application to this case of the question of insanity as defined in *MacNaughton's* case; it would not have been misdirection if there had been; the judge is bound to let his views be known. The prisoner's history might have justified a verdict of insanity, but the facts, and his own suggestion of suicide, shewed that he was capable of dealing with the case at his trial. It is impossible for us to interfere with the verdict. The jury were expressly told that if they agreed with Dr. Garden's evidence they could find the prisoner insane.

Application dismissed.

A. L. B. T.

JOHN HEARD.

An interval of nine months between release from prison and the commission of a crime, though primâ facie *it is good evidence against, does not necessarily rebut the charge of "leading persistently a dishonest or criminal life": the nature of the primary charge proved and the facts brought out in evidence may satisfy the jury that the prisoner is a habitual criminal.*

A conviction in a foreign country for larceny is admissible evidence of a persistently criminal life.

This was an appeal against conviction as a habitual criminal, by leave of Hamilton J. Appellant was convicted on 15th November at the Central Criminal Court of shopbreaking on September 7th, and as a habitual criminal, and sentenced by the Recorder to three years' penal servitude, to be followed by five years' preventive detention.

Appellant in person. I came out of prison nine months before my arrest on this charge. I had then £36 in my possession, and went to work selling fruit in the streets, but could not make it pay In May and June I was employed by a steeplejack,

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Connell, who gave evidence in my favour, but I was turned off because there was no work for me. After that I looked after the home while my wife was at work, and did my best to get an honest living.

C. L. Attenborough for the Crown. Appellant did not give evidence on this charge, and there is no evidence that he was in possession of any money or sold fruit in the streets. The mere fact that there was an interval of nine months since the prisoner's last release from prison is not enough to induce the Court to interfere with a verdict of guilty. It was necessary that the attention of the jury should have been drawn to the fact; see *Kelly*, 3 Cr. App. R. 248; 26 T. L. R. 196; 74 J. P. 167 (1909); this was done in this case. The Court will not lay down any fixed period. In the case of *Martin*, 5 Cr. App. R. 31 (1910), the conviction was upheld although there was an interval of fifteen months, and evidence was given that the prisoner did some honest work in the time. The shopbreaking of which the appellant was convicted was evidently carefully planned, and Sheldon, who was convicted with him on both charges, has not appealed. The point was taken at the trial that proof of a conviction in France was not admissible as evidence that the appellant had been persistently living a dishonest life; although it has not been raised by the prisoner here, the authorities wish to have a direction on the point.

HAMILTON J: This is an appeal against a conviction as a habitual criminal. On 7th September, 1911, the prisoner and another man, who was an old convict, committed a robbery involving considerable skill and forethought, and valuable property was stolen. This is material as shewing that the persons engaged in it had criminal skill and criminal tendencies. The three statutory convictions were proved, and a subsequent sentence of five years' imprisonment, as one of a gang who were picking pockets at the Gare du Nord in Paris. The prisoner was released in France on December 10th, 1910, but no evidence was given by the police of his life in the interval of over eight months which elapsed before his arrest. The prisoner, on the other hand, called Connell to prove that he had done honest work for him; against this it is said that the prisoner did not give Connell's name when

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asked by the police. It was for the jury to accept or reject Connell's evidence. The Recorder, in summing up, discussed the question of the admissibility of the evidence of the Paris conviction. This point is without substance; it was clearly admissible as evidence that the prisoner was then leading a dishonest life. The Recorder then referred to *Kelly* (above), where it was held that the summing up should have directed the attention of the jury to the interval between the present and the last conviction, and he said to the jury, "I now direct your attention to that interval." The real question is as to the sufficiency of that direction, having regard to other cases which were not referred to by the Recorder. The point is important, because juries are apt to think that any person who has been many times convicted is, *ipso facto*, a habitual criminal.

There are two classes of cases. First, those such as *Kelly* (above), and *Wells*, 5 Cr. App. R. 33 (1910), which point out that the attention of the jury ought to be drawn to the length of the interval, having regard to the possibility that the man may have turned over a new leaf in the time; secondly, those which deal with the question whether there was sufficient evidence on which the jury could find the prisoner a habitual criminal; see *Baggott*, 4 Cr. App. R. 67; 26 T. L. R. 266; 74 J. P. 213 (1910); *Condon*, 4 Cr. App. R. 109 (1910), and *Martin*, 5 Cr. App. R. 31 (1910). In the first class the question is whether, there being evidence for the jury, they have been sufficiently directed with regard to it; in the second, the question is whether there is a case to go to the jury at all. The latter is the question here. In *Condon*, the crime was committed six and a half weeks after the prisoner's last release from prison, and it was held that there was no ground for interference, but Bray J. added, "It is, of course, a question of degree. When you get six months interval, further evidence is required." This is a happy illustration merely, and does not lay down any hard and fast rule. In *Baggott*, where the interval was three months, Pickford J. said: "Some additional evidence beyond the three convictions is necessary to prove that at the time of the last conviction he was persistently leading a criminal or dishonest life." That evidence may take many forms, such as association with criminals, the possession of funds too great to be due to the prisoner's own earnings or to the charity of others, the character of the crime, either where

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it is similar to the prisoner's former crimes, or is only possible after careful preparation. Where the interval between the last known fact against the prisoner and the commission of the substantive crime is considerable—and six or nine months are a considerable interval—there should be additional evidence. In this case there was such evidence, for the crime was carefully planned, was committed in association with another habitual criminal, and was carried out with skill, so the jury, with the facts before them, were justified in convicting, and needed no further direction.

Appeal dismissed.

A. L. B, T.

JAMES HENRY JOSEPH HILL.

Though the Court has reason to believe that an appellant is insane it cannot interfere on that ground, if he has refused to set up the defence of insanity at the trial.

This was an application for leave to appeal against conviction and sentence, and to call further evidence. Appellant, who was not present, was convicted at the Central Criminal Court, on November 22nd, 1911, of assault on a police officer in the execution of his duty, and sentenced to twelve months' imprisonment with hard labour by the Common Serjeant.

BANKES J.: This is an unusual case. The prisoner was indicted for wounding a police constable with intent to do grievous bodily harm, and found guilty but insane. That conviction was quashed by this Court [*above*, p. 26], and he was then tried on an indictment with counts for causing actual bodily harm and for assault. He successfully pleaded *autrefois acquit* to the first, but refused to set up the defence of insanity on the second, and was found guilty. The Common Serjeant obviously thought him insane, but as the prisoner refused to set up the defence, this Court cannot interfere; it is a case for the Home Secretary.

Application refused

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GEORGE GREEN.

Severity of sentence.

This was an appeal against sentence, by leave of Hamilton J. Appellant was convicted at the Central Criminal Court of possessing a mould and counterfeit coin, and was sentenced to five years' penal servitude on the 14th November, 1911.

G. St. John Macdonald for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The sentence was too severe, in view of the fact that the prisoner had not been previously convicted, and is only a young man.

Whiteley, for the Crown. The prisoner was convicted on two separate indictments; he had been tried on a previous occasion and acquitted.

The Lord Chief Justice: A considerable amount of coining plant was found at the prisoner's lodgings. This was a serious coining offence, and such offences are always severely punished, but the previous acquittal should be weighed in his favour. The sentence will be reduced to one of three years' penal servitude.

Sentence reduced.

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The true construction of s. 4 (1) *of* 61 & 62 *Vict. c.* 36, *the Criminal Evidence Act,* 1898, *is that in the cases therein mentioned or brought thereunder by subsequent enactments, the wife or the husband of a defendant is a compellable witness.*

Remarks by Wills J. in Brazil, 63 *J. P.* 138 (1899), *explained.*

These two cases, which involved the same question of law, were heard together.

Acaster appealed against conviction, by leave of Hamilton J. He was convicted at the Leeds Assizes, before Phillimore J., on the 18th November, of carnal knowledge of a girl under

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sixteen, and sentenced on the 25th November to fifteen months' imprisonment with hard labour.

Leach appealed against conviction on a point of law. He was convicted at the Stafford Assizes on the 24th November, of incest, and sentenced by Pickford J to three years' penal servitude.

W. Valentine Ball for the appellant Acaster (under s. 10 of the Criminal Appeal Act), who was present. The appellant is a married man, and the offence was alleged to have been committed against his step-daughter on the 17th May. The date is important because the prosecution must be instituted within six months of the offence. In September the girl was delivered of a child, but as it was a full-time child, it was obvious it was not the result of any offence in May, although she alleges that the prisoner was the father of the child. The witnesses for the prosecution were the girl, her mother, that is the wife of the prisoner, and a woman named Mallinson, and my submission is that the evidence of the prisoner's wife was inadmissible. She was ill at the time of the trial, and her depositions were read, but before the magistrates she stated that she wanted to shield her husband; she thus had no opportunity of objecting to give evidence at the trial, which, it is submitted, she could have done, since she is merely a competent, and not a compellable witness. The point was not taken at the trial because the prisoner was undefended.

The principle that a wife's evidence is not admissible against her husband is very old, and it was stated by Ashurst J. in *R.* v. *Inhabitants of Cliviger*, 2 T. R. at 268 (1788), that "The ground of the wife's incompetency arises from a principle of public policy, which does not permit husband and wife to give evidence that may even tend to criminate each other," and *per* Grose J., "The true and best ground of objection is not that of interest, but is founded on the political inconvenience of causing dissensions in families between husband and wife." There were then various Acts passed which made the defendant or defendant's spouse a competent witness in certain proceedings under those Acts (collected in Russell on Crimes, 7th ed., p. 2272), but in only three cases were they made compellable witnesses, namely:—in proceedings for non-repair of a highway, &c., under the Evidence Act, 1877, s. 1, from which dissensions in the family were not likely to arise, under the Customs Consolidation Act,

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1876, s. 259, which is in the nature of civil proceedings, and under s. 1 of the Married Women's Property Act, 1884, wives and husbands (but not the defendant) were made compellable witnesses. The Criminal Law Amendment Act, 1885, was the Act under which this prosecution was instituted, and s. 20 enacts that the husband or wife of the person charged under certain sections of the Act (and that person) shall be a competent, but not compellable, witness on every hearing at every stage of such charge except an inquiry before a grand jury. Then came the Criminal Evidence Act, 1898, which enacted in s. 1 that the wife or husband of every person charged with an offence is a competent witness for the defence at every stage of the proceedings, but only with the consent of the person charged: and by s. 4 (1), "The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act" (of which the Criminal Law Amendment Act, 1885, is one) "may be called as a witness either for the prosecution or defence, and without the consent of the person charged." This Act only clears up the doubts which existed, whether under the Criminal Law Amendment Act, 1885, the consent of the accused was necessary, and whether the wife was a competent witness for both prosecution and defence. The Act of 1898 must be construed strictly. The fact that a witness may be called does not imply that she can be forced to give evidence, see *R.* v. *Inhabitants of All Saints, Worcester,* 6 M. & S. at 200 (1817) *per* Bayley J. The point has been raised on more than one occasion, see *Dunning,* 34 L. J. Newspaper, 33 (1899); *Brazil,* 63 J. P. 138; 34 L. J. Newspaper, 132 (1899); *Ellis,* 34 L. J. Newspaper, 646 (1899), but it never came to the Court of Crown Cases Reserved for consideration. The maxim, *Generalia specialibus non derogant* applies, and it cannot be inferred from the general Act of 1898 that the rights of witnesses, as defined in the Act of 1885, are cut down. The whole proceedings were tainted by the evidence of the wife, so if her evidence was inadmissible the conviction should be quashed, especially as it is her evidence mainly which proves the date of the offence.

V. G. Milward for the appellant Leach, who was not present. In this case the prisoner's wife objected to give evidence both before the magistrates and at the trial, but Pickford J. ruled

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that she was a compellable witness. The point arises in this case because the Incest Act, 1908, by s. 4 (4) is incorporated in the schedule of the Criminal Evidence Act, 1898. A competent witness means a person who may be called as a witness. The difference between competence and compellability was clearly recognised in s. 3 of the Evidence Act, 1851 (14 & 15 Vict. c. 99), the first Act dealing with the subject, and the distinction has been maintained in subsequent Acts and in Acts passed not long before the Criminal Evidence Act, 1898, *e.g.*, the Law of Distress Amendment Act, 1895, and the Chaff-cutting Machines (Accidents) Act, 1897. In the Criminal Evidence Act, 1898, the words "may be called as a witness" might be ambiguous but for previous enactments; construed in the light of them, the words mean the same as "competent." The text books differ as to the meaning of the words; in Archbold's Criminal Pleadings (p. 465, 24th ed.) and in Stone's Justices' Manual (p. 355, note (*h*), 43rd ed.) they are regarded as meaning competent but not compellable, in Harris's Criminal Law (p. 396, 11th ed.) competent and compellable, while in Russell on Crimes (p. 2277, 7th ed.) the matter is regarded as doubtful. A common law right of such long existence should not be taken away without clear words of a statute to support such a course, especially when a right so valuable to the subject is concerned. If the wife of a prisoner is compelled to give evidence the door is opened to an enormous amount of perjury.

Horace Wilson for the Crown in Acaster's case. The witness did not object to give evidence before the magistrates, so the question of compellability does not arise.

T. M. Snagge for the Crown in Leach's case. On general grounds the words "may be called" were intended to put the wife of a prisoner in the position of an ordinary witness.

(He was stopped by the Court.)

The LORD CHIEF JUSTICE. These cases as argued raise the same question, namely, whether the evidence of a prisoner's wife is admissible against him without her consent under the Criminal Law Amendment Act, 1885, and under the Incest Act, 1908.

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The point was not taken by Acaster's wife, and we doubt if it is open to the prisoner now, but as the point was going to be raised in another case, we allowed the counsel for the appellant to raise it. She gave evidence before the magistrates, and while it is true she said she wanted to shield her husband, this does not amount to a refusal to give evidence. She was not present at the trial owing to illness, and her depositions were read. It is possible that if she had been present the point might have been raised.

The point was raised and argued in Leach's case, and the evidence was admitted by Pickford J., following the previous cases, leaving the question to be decided by this Court.

The question is whether under the six Acts mentioned in the schedule to the Criminal Evidence Act, 1898, and under the Incest Act, 1908, the wife of a prisoner is a compellable witness; the Court thinks she is. The language of the section may not be very satisfactory; in *Brazil* (above), Wills J. said that "he did not know what the Act meant, and he did not suppose that anyone else did so either," but it is right that I should mention that I saw him after that case, and, on my giving him the explanation which I am about to give now, he withdrew his opinion. We have to consider the meaning of the words "may be called as a witness either for the prosecution or defence, and without the consent of the person charged." The position before the passing of the Act of 1898 was this: there were several Acts of Parliament which had allowed the defendant to be called as a witness under certain circumstances; in nearly all of these he or she could only be called with his or her consent. The same law applied to the wife or the husband of a defendant. There were also Acts which actually made the defendant a compellable witness and made the spouse a compellable witness for the prosecution. In these circumstances the Legislature might have made s. 4 of the Act of 1898 applicable to all or any of these Acts. What it did was to pick out six Acts creating offences as to which it was desirable in the interests of justice that the wife should give evidence, particularly the Criminal Law Amendment Act and the Prevention of Cruelty to Children Act.

At that time it was quite clear that a wife, in a charge under the Criminal Law Amendment Act, 1885, was not compellable, for s. 20 of the Act said so in terms. The Prevention of Cruelty

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to Children Act, 1894, s. 12, went a little further, enacting, "In any proceeding against any person for an offence under this Act . . . such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence." Although the wife could be required to attend, it could not be argued that she was compellable under that section; she might be called, but could then take the objection. In these circumstances s. 4 of the Act of 1898 specified six statutes and said as to them that the wife "may be called as a witness either for the prosecution or the defence." Cases where there would be an objection to the wife's evidence for the defence are probably rare, but the words "without the consent of the person charged" may occasionally be wanted even then. It seems to the Court that as the language in the Act is different from that used in any of the earlier Acts, the Legislature intended, as regards those scheduled Acts, under which it was necessary in the interests of justice that the wife should give evidence, to make her a compellable witness. This is the opinion of Sir Harry Poland as stated in his preface to Mr. Allen's edition (1898) of The Criminal Evidence Act (p. xxvi.). S. 4 is sufficient to make a wife called for the prosecution an ordinary witness, and therefore compellable. The appeals are dismissed, but in Leach's case the sentence may run from the date of conviction.

Appeals dismissed.

Solicitors for the Appellant Leach—*Mills, Curry and Gaskell*, agents for *Johnson & Son*.

A. L. B. T.

ALFRED ERNEST BAKER.

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On an indictment for intimidation, it is for the jury to find whether the words used amounted to intimidation.

This was an appeal against conviction on a point of law. Appellant was convicted of intimidation at the Warwick Assizes,

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on the 18th November, and sentenced by Ridley J. to three months' imprisonment with hard labour.

Maddocks for the appellant, who was present. The prisoner was charged jointly with thirteen other men with intimidating and besetting in connection with the recent railway strike. On the 19th August, at 11 p.m., a body of forty or fifty miners came down the passage leading to the railway premises at Stockingford, and various threats were made with the object of getting the railway men to leave the premises. Seeing that they were unable to cope with the crowd, the police agreed to bring out the railway men, and four were brought out. It was not until then that the prisoner appeared on the scene, and no threats used before that could be evidence against him. In answer to a remark made by Hall, one of the men, the prisoner shouted out "Liar," and he also said, according to the evidence, "What about King? he is down there; we mean to have him out," and when King came to the gates, "You will have to come out." The prisoner denied using these words, and King stated that he did not hear them, and was not intimidated by them. The prisoner finally escorted King home. Serious threats were made afterwards, but the prisoner was not there. He was one of three pickets charged, and the other two were acquitted.

According to *Connor* v. *Kent*, [1891] 2 Q. B. 545; 61 L. J. M. C. 9; 65 L. T. 573; 17 Cox C. C. 354; 55 J. P. 485, intimidation is a threat of personal violence, and there was no evidence of any such intimidation here. If the prisoner made the threats, no one was intimidated by them, and they were made, if at all, after King was brought to the gates for the purpose of being brought out, and so the intimidation of King had already been completed. If the evidence of what the crowd did was to tell against the prisoner, common design or conspiracy must be proved; there was no evidence of this, although in cross-examination it was suggested that the pickets had incited the crowd, and the judge in his summing up stigmatized the prisoner as one of the ringleaders; he also said, "I can't see how it can be contended that he was not a party to the intimidation"; this was the question the jury had to decide, and it was never properly left to them. It was open to doubt whether "You will have to come out" was a reference to the promise made by the police

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or a threat of injury if he was not brought out. I indicated this in cross-examination, but as the answer I received did not assist me, I did not refer to it in my speech to the jury. However violent the words used may be, it is still a question for the jury whether they constitute intimidation; see *Walton*, L. & C. 288; 9 Cox C. C. 268; 32 L. J. M. C. 79; 9 Jur. N. S. 259; 7 L. T. 754 (1863), affirmed in *Tomlinson*, [1895] 1 Q. B. 706; 64 L. J. M. C. 97; 15 R. 207; 72 L. T. 155; 43 W. R. 544; 18 Cox C. C. 75; C. C. R.

Hugo Young, K.C., and *R. A. Willes* for the Crown. It is not necessary that the words used by the prisoner should have reached King, or that he should have been caused to come out by the words used. The crowd was undoubtedly besetting the station and causing intimidation, and if the prisoner was there, and by his conduct at any moment shewed that he was not a mere onlooker, but a participator, the jury may assume that he was one of the crowd who were intimidating and besetting. It is neither necessary nor possible to prove that any particular man was made to leave by the threats of the prisoner. The case that the prisoner was assisting the police after they had undertaken to bring the men out was never made at the trial, and is inconsistent with the fact that he denied using the words at all.

Maddocks: The point was put in cross-examination, and even if it was not it should have been put by the judge in summing up, since the onus is on the prosecution to prove their case.

BANKES J.. The prisoner was charged with a number of other men on an indictment containing a number of counts for wrongfully intimidating, besetting the station, and intimidating particular individuals. There is no doubt that there was intimidation and besetting on the night in question by a large number of persons assembled to call out, by violence if necessary, the men who were working at the station. There were three stages to the proceedings; firstly, a hostile crowd assembled soon after the closing of the public-houses, and used language which made it clear that they were there with the avowed intention of fetching the men out. It was clear that the police had not a sufficient force to resist the crowd, and the inspector wisely decided to conciliate

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them by telling the men to come out. This did not render the conduct of the crowd any the less intimidating or besetting. In my view, there was no evidence connecting the prisoner with the crowd at that stage except as an onlooker. The second stage commenced when the inspector brought the four men to the wicket gate of the station, and continued until King came and was escorted away by the prisoner. The third stage was after the prisoner had left.

The prisoner is only connected with the second stage, but the evidence shews that at this stage he was something more than a mere onlooker. He himself admits this, because he admits calling out that what Hall was saying was a lie, but this does not necessarily bring him within the category of a person intimidating or besetting. But the evidence for the prosecution proves more than this. He used language when the four men were brought out, and he knew that King was still there, which meant that his efforts, and those of the crowd, were to be directed to seeing that he came out. It was a question for the jury whether such language was intimidation. The judge in his summing up must be guided by the case set up for the defence. A possible defence was that the language was only used by way of friendly assistance to the police. Mr. Maddocks very fairly admits that he made no point of this in his final address to the jury because the prisoner did not take that line himself. He said the police were lying; it was not a question what he meant, but whether he said the words at all. On that question the matter was fairly left to the jury.

It was for the jury, assuming the language was used, to say whether it amounted to intimidation. The judge explained to them what intimidation and besetting meant, and put the cases of the various prisoners fairly to them, when the summing up is taken as a whole. It is impossible for this Court to say there was any miscarriage of justice, or that the verdict cannot be supported as being unreasonable. The prisoner is alone to blame for not putting the other defence forward, if he wished to rely on it, so he cannot complain of the verdict of the jury.

Appeal dismissed.

Solicitors for the Appellant—*Oakes & Son.*

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A partner who signs the firm's name in accepting a bill of exchange, with intent to defraud and without lawful authority or excuse, does so "by procuration or otherwise, for, in the name or on the account of" some "other person" within s. 24 of 24 & 25 Vict. c. 98, the Forgery Act, 1861.

This was an appeal against conviction upon the certificate of Avory J., before whom the case was tried. Appellant was convicted on the 30th November, at the Manchester Assizes, of an offence under s. 24 of the Forgery Act, and sentenced to three months' imprisonment.

Langdon, K.C. (with him *J. C. Jackson*) for the appellant, who was present, on bail. The grounds on which the certificate was granted were as follows:—"The prisoner was indicted under s. 24 of the Forgery Act for accepting a bill of exchange in the name of another person without lawful authority or excuse, with intent to defraud. He was a member of the firm of 'Holden and Fullerton.' The bill was accepted by him in the name of 'Holden and Fullerton' for the purpose of raising money for his own individual benefit, and the proceeds applied to such purpose.

"The jury found (1) that he had not authority in fact to accept this bill; (2) that he had no honest belief at the time that he had authority to do so; (3) that he intended to defraud at the time when he signed the name on the bill.

"I was of opinion that this was not an acceptance in the name of *another* person within the meaning of the section, but as the point does not appear to have been previously decided, and the prosecution contended that the prisoner had in fact accepted in the name of 'Fullerton' without his authority, and thereby made Fullerton liable to a *bonâ fide* holder, I directed the jury to convict, and gave leave to appeal. (Signed) Horace E. Avory."

The question is—can a man be convicted who has authority to sign a name for lawful purposes, and who signs it for unlawful purposes?

The bill of exchange was not accepted in the name of "a person." A firm is not included in the definition of the word "person" in the Interpretation Act, 1889, so the designation of a firm is not the designation of a person, because in the eye of

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the law a firm has no personality at all; this is made clear by the Partnership Act, 1890, s. 4. To sign a name by which the business belonging to the person signing it is known is not forgery, though he may be guilty of fraud in falsely representing that he has authority to use the name. If the partnership had a fancy name, such as "Yarns & Co.", could it be said that a bill so accepted was accepted in the name of another person? The section was drafted to get over the decision of the Court for Crown Cases Reserved in *White*, 2 C. & K. 404; 1 Den. C. C. 208; 2 Cox C. C. 210 (1847) that to accept a bill of exchange by procuration was not forgery. Had the prisoner signed "Frank Holden and Hugh Fullerton," he might be in difficulties, but here only half the names of the partners are selected for the firm name.

Secondly, the bill of exchange was not accepted in the name of "another person." The name was the prisoner's as much as his partner's; this is clear from the Partnership Act, 1890, s. 29; a partner has the right to use the name, subject to a liability to account. The firm name is part of the assets of the business, and in the absence of any contract to the contrary, either partner could use it after the dissolution of the partnership; see *Levy* v. *Walker*, 10 Ch. Div. 436; 48 L. J. Ch. 273; 39 L. T. 654; 27 W. R. 370 (1878) In that case Jessel M. R. said: "The firm name was not the real name of anybody. It was compounded of or derived from the surnames, that is, portions of the names of the two partners." See also *Banks* v. *Gibson*, 34 Beav. 566; 34 L. J. Ch. 591; 13 W. R. 1012; 11 Jur. N. S. 680 (1865), and *Ex parte Corbett, In re Shand*, 14 Ch. Div. 122; 49 L. J. Bk. 74; 42 L. T. 164; 28 W. R. 569 (1880). The result of the cases is that each of the partners is seised of the partnership name *per my et per tout*, subject to the liability to account, so it cannot be said to be "another name."

Lastly, the bill of exchange was not accepted "by procuration or otherwise, for, in the name, or on the account of" any other person. The signature, to come within the section, must be a signature *per pro*, and must be done without authority.

A. S. Comyns Carr, for the Crown, was not called upon.

HAMILTON J.: The appellant was indicted under s. 24 of the Forgery Act, 1861, for feloniously and without lawful excuse accepting a bill of exchange in the name of "Holden and Fuller-

ton," with intent to defraud. At the trial the jury were asked to answer particular questions, which they did as follows: (1) Had the defendant authority to accept this bill of exchange in the name of Holden and Fullerton?—No. (2) Did the defendant accept the bill in the name of the firm under the honest belief that he had authority to do so?—No. (3) Did the defendant sign the name of Holden and Fullerton on this bill with intent to defraud?—Yes. Avory J. had the point taken that the case was not within s. 24, but he directed the jury to convict, and raises the question for the consideration of the Court of Criminal Appeal.

The appellant, with intent to defraud, accepted a bill of exchange payable at the London and Westminster Bank in the names of Holden and Fullerton. He not only accepted a negotiable instrument on which a contractual liability would arise, but he wrote "Holden and Fullerton," being the names of himself and another who was his partner under articles of partnership. How can it be said that he did not accept the bill in the name of another person, namely, Fullerton? and none the less so, although the Christian name and initials are missing, and a "&" inserted, suggesting, as was the fact, that Fullerton was his partner. The answer given is that "Holden and Fullerton" was not the name of any person, but a trade description, being the firm name of two persons. A firm, however, is not, as in Scotland, a separate legal *persona*, and distinct from the persons who compose it. The argument seems to do violence to the language of the section and to nullify what is its intention, namely, to overrule *R.* v. *White* (above). Unless a person could be convicted in such circumstances, s. 24 would still leave a large class of mercantile frauds unpunished. The facts come within the very words of the section; the acceptance was one which created a personal liability affecting Fullerton.

Then it is suggested that it is not an acceptance in the name of another person, because Holden had as much right to the name "Holden and Fullerton" as Fullerton had; but although the name might be a partnership asset to which both partners have a right, this is no answer to the plain fact that what Holden was doing was not to use the partnership assets, but to write the names of himself and his partner, for which he had no authority, in the circumstances.

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Lastly, it is said that there was no acceptance by procuration or otherwise, but even if there was no acceptance by procuration, there was acceptance "otherwise," and in a manner similar to procuration, for Holden was the general agent of Fullerton, but was misusing an authority which, up to a certain point, he had.

It is unnecessary to discuss what the position would be if the firm name were not indicative of a person at all, *e.g.*, "The Anonymous Trading Company." In the present case the section was satisfied.

Appeal dismissed.

Solicitor for the Appellant—*E. G. P. Worsley.*

A. L. B. T.

VASTAN KERVORKIAN.

Severity of sentence.
Penal servitude should not, as a rule, be inflicted for a first offence.

This was an appeal against sentence, by leave of Hamilton J. Appellant, who was not present, was convicted on the 5th October at the Liverpool City Sessions of larceny, and sentenced by the Recorder to three years' penal servitude.

A. H. Maxwell for the Crown. The prisoner, who had not been previously convicted, was indicted with other prisoners, some of whom had previous convictions against them. It is true that the Recorder did not discriminate, but sentenced them all to three years' penal servitude.

The LORD CHIEF JUSTICE: Leave has been given by Hamilton J. to appeal against sentence in this case. This Court does not interfere with a sentence unless a question of principle is involved; there is such a question here. The prisoner had nothing against him as far as previous convictions were concerned, and it is not usual to give a sentence of penal servitude for a first offence unless the surrounding circumstances point to matters of extreme gravity, or the nature of the crime itself necessitates a severe sentence

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In this case the sentence will be reduced to eighteen months' imprisonment with hard labour, to run from the date of conviction, and deportation will be recommended.

Sentence reduced.

A. L. B. T.

THOMAS WILLIAM JOHNSON.

Severity of sentence.

It is undesirable to inflict a term of imprisonment to follow upon a term of penal servitude.

This was an appeal against sentence, by leave of Hamilton J. Appellant, who was not present, was convicted on November 23rd at the Leeds Assizes, of forgery, before Horridge J., and sentenced to eighteen months' imprisonment with hard labour. On the 16th October he had been convicted of housebreaking at the Wakefield Quarter Sessions, and sentenced to three years' penal servitude.

B. R. Stansfeld for the Crown. The sentence of hard labour will have to be served after the expiration of the sentence of penal servitude. In *Islip*, 3 Cr. App. R. 96 (1909), a sentence of penal servitude following one of hard labour was altered, but in that case both offences were charged in the same indictment. In *Jones*, 1 Cr. App. R. 196 (1908), a sentence of penal servitude following one of hard labour was also altered; in that case the sentences were imposed by two Courts of co-ordinate jurisdiction. According to the judgment of Phillimore J., some sentence must be passed, since the charge of forgery was not taken into consideration when the prisoner was sentenced to penal servitude, but he said, "As a general rule, it is undesirable to impose a term of hard labour to be followed by penal servitude." In this case, however, the hard labour would follow the penal servitude, and that differentiates the cases.

The LORD CHIEF JUSTICE: The judge obviously thought that the prisoner ought to be punished, but he did not consider the effect of imposing a term of imprisonment to follow penal servi-

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tude. Accepting the view that there ought to be some sentence, and without saying that there was any serious mistake, we think it best to alter the sentence to one of three and a half years' penal servitude, to run from the date of conviction at Quarter Sessions.

Sentence varied.

A. L. B. T.

WALTER FREDERICK EVEMY.

Severity of sentence.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted at the Middlesex Sessions, on the 25th November, of housebreaking, and sentenced to twelve months' imprisonment with hard labour, Borstal treatment being recommended.

Appellant in person. It was my first offence, and I had a good character. I have been a grocer's assistant for three years, earning twenty-five shillings weekly. I left that situation for one at higher wages, but was discharged after two weeks on the ground that I was not old enough. I went to my sister's house to ask for help, but no one was in; seeing her jewellery, I yielded to a sudden temptation.

Greenfield for the Crown. The prisoner's health is said not to be good enough for the ordinary Borstal treatment.

The LORD CHIEF JUSTICE: The sentence is severe for a first offence; it will be reduced to six months' imprisonment from the date of conviction.

Sentence reduced.

A. L. B. T.

ALEXANDER FRASER.

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The doctrine (*in* Joiner, 74 *J. P.* 200; 26 *T. L. R.* 265; 4 *Cr. App. R.* 64; 1910) *that where, at the close of the case for the prosecution, there is no evidence to go to the jury, and a submission to that effect is made, this Court will disregard the subsequent evidence, doubted.*

This was an appeal against conviction, by leave of Hamilton J. Appellant was convicted at the Middlesex Quarter Sessions, on the 29th November, of obtaining goods by false pretences, and sentenced to seven months' imprisonment with hard labour.

Macaskie for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The prisoner gave an order on the 12th June to the Continental Tyre Co., the goods were delivered and a crossed cheque for £47 on the London City and Midland Bank, signed by the prisoner, was given in payment. On the 29th June he ordered goods from the Gaulois Tyre Co. and paid for them with a crossed cheque on his bank for £32 on the same day. The pretence alleged in the indictment was that these cheques were good and valid orders for the payment of money, and that he had a balance in his bank to meet them. On the 13th June the balance in his bank was only ten shillings, but on the 14th June he paid in for collection a cheque for £103 on his brother's account in the Birkbeck Bank, which account was kept in the name of Coe. On June 15th the £47 cheque was returned marked E. N. C. (effects not cleared); on the 17th the company wrote to him that they were going to re-present the cheque, and asking him to see that it was met. He did not reply, nor did he to a letter of the 21st telling him that the cheque had been returned again, marked "R. D.", and threatening a civil action. On June 19th, the Birkbeck Bank then being in the hands of the Official Receiver, appellant's bank informed him that the Birkbeck cheque had been returned, marked, "dated prior to order of Court," and on the next day he wrote to his bank, expressing surprise, and asking them to re-present the cheque. The bank manager suggested on June 21st that he had better get a new cheque from the drawer, and he did so on the 27th June, and at once paid it into his bank. On June 27th he got another letter from the Continental Company, to which he did not reply.

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On the 1st July the Birkbeck Bank returned this cheque, marked "N. S.", which meant "not sufficient assets," and on July 3rd the Gaulois cheque was dishonoured on presentment and marked "N. S."

I submitted that on this evidence there was no sufficient case of an intent to defraud to go to the jury, and the first ground of appeal is that the Chairman should have withdrawn the case from the jury at the close of the case for the prosecution, which he ought to have done if the prisoner had reasonable grounds for believing that the cheque for £103 would be honoured, and that, therefore, his two cheques would be met. The marking on the Birkbeck cheque when it was first returned gave no indication of the state of his brother's account. I referred to *Walne*, 11 Cox C. C. 647; 23 L. T. 748; C. C. R. (1870), and *Hazleton*, L. R. 2 C. C. R. 134; 44 L. J. M. C. 11; 31 L. T. 451; 13 Cox C. C. 1 (1874), as authorities for stopping the case. Secondly, if the case ought to have been stopped, this Court should not consider the evidence given for the defence, even if it pointed to the prisoner's guilt; *Joiner*, 4 Cr. App. R. 64; 74 J. P. 200; 26 T. L. R. 265 (1910); though *George*, 73 J. P. 11; 1 Cr. App. R. 168 (1908), and *Pearson*, 72 J. P. 449; 1 Cr. App. R. 77 (1908), are difficult to reconcile with that case. Even if the evidence for the defence is looked at it does not assist the prosecution. Thirdly, the summing up contained misstatements as to facts and omissions of points in prisoner's favour which amounted to misdirection; the Chairman said that there was no evidence from the Birkbeck Bank as to the state of the brother's account, and therefore the inference must be drawn against the prisoner; this throws the onus on the prisoner of proving his innocence; *Cohen* v. *Bateman*, 2 Cr. App. R. 197; 73 J. P. 352 (1909).

E C. P. Boyd for the Crown. There was ample evidence to go to the jury. No reply was sent by the prisoner to the letters written by the tyre companies when his cheques were dishonoured, although their terms were such as to shew that an answer was expected, especially the letter of the 21st June from the Continental Tyre Company, in which they threatened to issue a writ. When early in July the creditors called at his place of business they found it shut up. His own evidence was unsatisfactory, and the jury may well have doubted his story.

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Macaskie: What is said to point to the prisoner's guilt only indicated carelessness.

The LORD CHIEF JUSTICE: The point that there was no evidence to go to the jury does not really arise in this case. Where an objection is taken by counsel unsuccessfully, and he then calls evidence, this Court is not bound to disregard the effect of that evidence. In *Pearson* (above), where the conviction was quashed, I said, "Of course, if admissions by the defendant had supplied the evidence that was wanting, we should not have interfered with the jury's verdict," and in *George* (above) Phillimore J. said, "As the case proceeded to the end the Court of Criminal Appeal are of opinion that they ought to look at the whole of the evidence;" it is true that in *Joiner* (above), Darling J. said: "If there was no evidence that he stole them, then it was the duty of the Court to withdraw the case from the jury. We have no right to look and see whether any evidence of larceny was elicited after the close of the case for the prosecution, when counsel for the prisoner submitted that there was no evidence to go to the jury." At present the Court is not prepared to follow *Joiner,* but prefers the reasoning in the other two cases But here there was a case to go to the jury, first, because even though the prisoner thought he had a right to draw the cheques, he gave no explanation when they were dishonoured, though asked to by both companies. If he could honestly have given a reply he would have done so. Secondly, because his premises were found shut up, and there was no evidence of any business being carried on there at all. The jury had the prisoner's account, and it was for them to say whether it was satisfactory. It seems to us that his account was not consistent with mistake or blundering, so we cannot say the jury ought not to have found the verdict they did.

It is argued that the summing up did not contain sufficient directions as to the case for the defence. As this Court has repeatedly said, mere omission is not of necessity misdirection. Moreover, as in this case the prisoner was represented by counsel, we cannot say that this is a ground for allowing the appeal. There was no omission to call the attention of the jury sufficiently to any part of the case.

Appeal dismissed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD, AND MR. JUSTICE AVORY.

JOHN SIDNEY HOWSE.

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A contrivance (known as a "cut-out letter"), consisting of an addressed envelope with a stamp on it, which has been duly post-marked in passage through the post, if it is sent again through the post with an enclosure added, is, on the authority of Riley's *Case, a "forged or altered instrument" within s.* 38 *of* 24 & 25 *Vict. c.* 98 (*the Forgery Act*, 1861).

This was an appeal against conviction on questions of law; there was also an application to appeal against conviction on fact, and against sentence. Appellant was convicted at the Maidstone Assizes, on the 25th November, 1911, before Mr. Commissioner Dickens, K.C., under s. 38 of the Forgery Act, 1861 (24 & 25 Vict. c. 98), of demanding money by virtue of a "forged or altered instrument," and sentenced to fifteen months' imprisonment with hard labour.

Sydney E. Williams for the appellant, who was present. Appellant was indicted with three other prisoners, one of whom was a postman, for attempting to obtain money from bookmakers by betting on horses, which had already won the races for which they were backed, by what was known as the cut-out letter trick. By means of this trick a blank stamped envelope was obtained, bearing a postmark, which was afterwards used for sending the betting slips to bookmakers, who were thus led to believe that the letters had been posted before the race was run. The prisoners were tried on an indictment under the Forgery Act in respect of a letter posted at Chelsfield on the 11th August last; there were other indictments which were not proceeded with in respect of a letter posted at Green

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Street Green on the same date, and against two of the other prisoners only in respect of a similar offence on the 4th August; also indictments varying the charge to those of obtaining money by false pretences, and to conspiracy.

The conviction ought to be set aside, first, on the ground that evidence was improperly admitted as to the letters posted at Green Street Green, the subject, as stated, of another indictment for felony. This evidence did not shew that the acts charged against the accused were designed and not accidental, nor did they rebut a defence otherwise open to him, on which grounds alone is evidence of other offences admissible; see *Makin* v. *Attorney-General for New South Wales*, [1894] A.C. 57; 63 L.J.P.C. 41; 6 R. 373; 69 L.T. 778; 17 Cox C.C. 704; 58 J.P. 148. It is no doubt true that this evidence did not affect the prisoner, but the Commissioner did not draw the attention of the jury to this in his summing up, and a question asked by a juryman in the course of the trial shewed that he did not realise that Howse had nothing to do with the Green Street Green episode.

Secondly, the summing up of the Commissioner contained various misstatements. In particular, he frequently confused the incidents at Chelsfield and Green Street Green, thus intensifying the mischief done by the admission of evidence on the latter subject. It was admitted by Howse that he had been to Green Street Green on the 11th August, but the Commissioner stated that he had been to the post office there, which was not suggested by the prosecution, thus further suggesting his connection with both frauds.

The Commissioner twice observed in the course of the trial that Howse had been seen in conversation with Newman, one of the other jointly indicted prisoners. There was no evidence of this.

The main evidence against Howse was that of Mrs. Stacey, the postmistress at Chelsfield, who, for purposes of identification, had marked the letters "11 Aug." instead of "Aug. 11," and the defence was that she had inadvertently so marked more than the two letters in question. It is true she denied this, but she admitted stamping several letters "A.M." instead of "P.M.", and the evidence was not strong enough for the jury to convict on, especially as no reference to her accuracy was made in the summing up.

Mrs. Stacey said that she had received instructions with regard

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to cut-out letters, she then shewed in her further examination-in-chief that she did not know what a cut-out letter was. She further shewed her inaccuracy in first stating that she had stamped three or four letters A.M. instead of P.M. She later said two or three.

Fourthly, the letter was not a forged or altered instrument within the meaning of *Riley*, [1896] 1 Q. B. 309; 65 L. J. M. C. 74; 74 L. T. 254; 44 W. R. 318; 18 Cox C. C. 285; 60 J. P. 519. There a telegram was altered, and the Court by a majority held it was an instrument, though two of the five judges doubted. Even if it became an instrument when the betting slip was added, it was not an instrument when altered.

If the conviction is to stand, the sentence was too severe. The appellant had not been convicted before, and had a good character in different situations extending over a period of sixteen years.

After verdict a detective gave evidence that Howse had been concerned in a similar trick before, but admitted that no prosecution had been instituted. Had he been tried and acquitted the evidence could not have been given, and ought not to have been admitted when it had not been thought necessary to prosecute.

R. D. Muir (with him *W. W Grantham*) for the Crown. The case for the prosecution was that this was one transaction in which all four prisoners combined, posting the "cut-out letters" at small village post offices from which the letters went to London by Orpington, collecting the letters so posted, meeting at Orpington, getting information as to the winners by telephone, writing out the betting slips, putting them in the post-marked envelopes, and handing them over to the postman, who got them into the mail bag without their receiving new post-marks. To ensure a clear post-mark two letters were posted at each post office, though only one from each was eventually used; it was a pure chance into which envelope Howse's betting slip was inserted.

As to sentence, although it was a first conviction, it was clear he had been a party to similar frauds in 1909. He then made two statements to a Post Office official, in the first of which he denied his guilt, but in the second he admitted filling up a betting slip with the names of winners, which a friend read to him from *The Star* newspaper, at 6 p.m., when racing for the day was over.

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As to the forged instrument, the envelope and the letter it contains must be read together; see *Pearce* v. *Gardner*, [1897] 1 Q. B. 688; 66 L. J. Q. B. 457; 46 L. T. 441; 45 W. R. 518; C. A.

Williams, in reply.

AVORY J.: In this case two points of law have been raised. The first is that evidence was admitted which was not admissible evidence against the prisoner, of letters being posted and collected at Green Street Green. The counsel who has represented him here also represented him at the trial, when he took no exception to the evidence, and this might be a sufficient answer even if the admissibility of the evidence were doubtful. But we hold that it was legally admissible; it was so if it was relevant to any issue in the case. Here four persons were acting in combination to get a post-mark on the envelopes, and then to use the envelopes to enclose slips betting on horses after the results of the races were known. Part of the scheme was that the postman Rogers should receive the envelopes and pass them through the post without their being re-stamped. It was also part of the case for the prosecution that the four persons, after obtaining the post-marked envelopes, met at Orpington, where one of them on the telephone ascertained the winners, and so they were able to send the betting slips. The evidence was admissible to prove that the other letter, posted at Green Street Green, had found its way into Rogers's bag, like the Chelsfield letter, by design and not by accident.

The second point is that the envelope and betting slip are said not to constitute an instrument which had been forged or altered within s. 38 of the Forgery Act, 1861. This point would have been open to more argument had it not been for the case of *Riley* (above), in which the Court of Crown Cases Reserved held that a telegram falsely dated as to the time at which it was despatched was a forged instrument. The judgment in that case covers the present one; Wills J. said (1896; 1 Q. B. 321): "I cannot see anything in the nature of such a section which should make it necessary or desirable to restrict the application of the word 'instrument' to writings of a formal character, and I think it is meant to include writings of every description if false and

known to be false by the person who makes use of them for the purpose indicated." If a telegram was held to be an instrument within that section, it is impossible to hold that an envelope, containing a betting slip, and addressed to a particular person, is not one.

The next question is whether it is a forged instrument. *Riley* is also an authority that it is, and so is the case of *Ritson*, L. R. 1 C. C. R. 200; 39 L. J. M. C. 10; 21 L. T. 437; 18 W. R. 73; 11 Cox C. C. 352 (1869). In that case a man was held to be guilty of forgery, who makes a deed in his own name, relating to his own property, if he puts a false date to it in order to give it a false operation. In that case Blackburn J. (1 C. C. R. 204) adopted the definition of forgery contained in Bacon's Abridgment (tit. Forgery), which was as follows:— "The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal, but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another which he is in no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have." Those words are applicable here.

The next point was that there were mistakes in the summing up. The most that can be said of these, is that they were verbal inaccuracies; that the Commissioner did not sufficiently discriminate between the letters posted at Chelsfield and those posted at Green Street Green. If the evidence as to the latter was admissible, this made no difference; the jury had listened to this case, and it is idle to suppose that they were misled by mere verbal inaccuracies.

Then we heard an argument, which is urged too frequently in this Court, that the jury ought not have returned the verdict they did, because they ought not to have believed a particular witness. It is not for us to decide whether the postmistress at Chelsfield spoke the truth; the matter was entirely one for the jury, and we cannot interfere with their verdict.

Finally, it is said that the sentence was too severe, but in our

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view it was not excessive, having regard to the serious fact that a false use was made of the official mark of the Post Office. There is no reason to interfere either with the verdict or the sentence.

Appeal dismissed.

Solicitor for the Appellant: *J. Hope.*

A. L. B. T.

BEFORE

MR. JUSTICE BRAY, MR. JUSTICE HAMILTON, AND MR. JUSTICE LUSH.

SIDNEY BERTIE HOPKINS (a).

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Leave to appeal given in view of a confession by another person of the crime of which appellant has been convicted.
Procedure.

This was an application for leave to appeal against conviction and to call further evidence. Appellant was convicted on the 21 December, 1911, at the Swansea Borough Sessions, of larceny of an overcoat, and sentenced by the Recorder to eight months' imprisonment with hard labour. Leave to appeal had been refused by the Judge on January 11th, but since then a man named Hutchings had confessed to the theft, and the appellant had been released by order of the Home Secretary.

Ralph Sutton for the appellant, who was not present.

Trevor Hunter for the Crown.

BRAY J.: It seems to us there is sufficient, subject to what the prosecution may say, to give leave to appeal. It must be done properly and regularly. When the appeal comes on, Hutchings must be here to give evidence. We give leave to appeal and order Hutchings to be present. The appellant may have counsel, but not solicitor, and the appellant must attend.

Trevor Hunter: One James Duffy identified the appellant as the man who sold the coat at his shop. The prosecution have

(a) See p. 126, below.

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ascertained that the son of that witness was present at the shop when the coat was sold, and is prepared to say that the appellant is not the man.

BRAY J.: He must be present also.

Leave to appeal.

Solicitors for the Appellant—*Andrew and Thompson*, Swansea.

A. L. B. T.

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LEON ALEXANDER.

If a defendant pleads guilty, owing to a misstatement of the law by the judge, the Court will quash the conviction.

This was an appeal against conviction and sentence. Appellant was convicted on the 14th February, 1910, under s. 55 of the Offences against the Person Act, 1861, of unlawfully taking Catherine Isabella Newman, a girl under the age of sixteen, out of the possession, and against the will, of her father (by the first count), and of Agnes Mallindane, a person having the lawful care or charge of her (by the second count), and was bound over in his own recognizances by Mr. Commissioner Rentoul, K.C., to be of good behaviour, and to come up for judgment if called upon. On the 12th December, 1911, he was brought up for judgment before the learned Commissioner, and sentenced by him to two years' imprisonment with hard labour. He then gave notice of appeal, and extension of time and leave to appeal were granted by the Lord Chief Justice.

C. L. Attenborough for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The girl, Newman, whom the prisoner was charged with abducting, was just under sixteen at the time. She said that her parents had objected to her going out with the prisoner, and sent her to Mrs. Mallindane's. On December 29th, 1909, after being there for three weeks, Newman ran away; she came to the Edmonton Music-Hall, where the prisoner was employed, sent for him, and in

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answer to his enquiries said, "I have run away from home, and am rather afraid to go home, in case mother should take me back." She waited in the music-hall until the performance was over, and they then went to the house of a Mrs. Hyde, in Edmonton, but found the house in darkness. The prisoner asked if she would come to a friend of his in London, and she assented. She asked if she could go home, and he said, "No, it is too late." It was then 11.30 p.m. They stayed for two nights at a restaurant in the Mile End Road, occupying one room with two beds; no impropriety whatever occurred then, or at any other time before his conviction. He took her to other addresses, including the houses of his mother and sister, and finally, on January 26th, 1910, her mother came and fetched her.

Sect. 55 of the Offences against the Person Act, 1861, has always been interpreted to mean that, to secure a conviction, it must be proved that the defendant has assisted or persuaded the girl to leave her home; if she goes away of her own accord he cannot be convicted, even if he conceals the fact that she is with him, or neglects to inform the police or her parents; see *Olifier*, 10 Cox C. C. 402 (1866); *Miller*, 13 Cox C. C. 179 (1876); and *Kauffman*, 68 J. P. 189 (1904). These cases cannot have been present to the mind of the Commissioner, for he frequently told the prisoner that it was no defence that the girl came to him, and that if he was defended by counsel he would be advised to withdraw his plea of not guilty; the prisoner protested that he had never abducted the girl. Among other remarks the Commissioner said: "The whole offence is having kept her secretly from her parents"; "After the evidence she gave to-day it seems to me impossible for you to meet the charge, remembering that she cannot consent"; "What she has told, and truthfully told, amounts to your having taken the girl out of the custody of her parents. You might have handed her over to her parents. It is your keeping her secretly, preventing them from knowing." After stating the law in this way, the Commissioner adjourned the trial from Saturday to Monday. On the Monday the prisoner stated, "I wish to withdraw my plea on this ground, that I never done no harm and did not mean to do no harm," to which the judge answered, "You withdraw your plea on the ground that you broke the law without knowing that it was the law," and bound him over in his own recognizances to

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come up for sentence if called upon, requiring him to promise that, apparently for all time, he would not speak either to the girl or her parents. Twenty months later he was found living with the girl, who had gone to him a month previously, as his wife, and he was then arrested, and given the maximum sentence, though he had never been previously convicted. The judge seems to have suspected that he was concerned in the white slave traffic, of which there was no evidence.

If the case had been left to the jury there was no evidence on which they could convict if properly directed as to the law; even if they could have convicted on a proper direction, that is no answer if the prisoner pleaded guilty on an incorrect statement of the law, as the whole of the evidence had not been given, and the prisoner had had no opportunity of making his defence on oath. Under s. 4 of the Criminal Appeal Act the Court can set aside the conviction if they think that on any ground there was a miscarriage of justice, as there was here, and the Court can quash the conviction even though the prisoner pleaded guilty; *Verney*, 73 J. P. 288; 2 Cr. App. R. 107 (1909).

Travers Humphreys for the Crown. It cannot be contended that the judge's conduct has resulted in a satisfactory trial, but that is not sufficient reason for quashing the conviction. Though the girl said, "I have run away from home," meaning Mrs. Mallindane's, which disposed of the second count, she was still in the constructive possession of her father, and there was evidence to justify a conviction on that count. There was evidence that the prisoner persuaded the girl not to go home, which would be sufficient to satisfy the section; *Mankletow*, Dears. & P. C. C. 159; 22 L. J. M. C. 115; 6 Cox C. C. 143; 17 Jur. 352 (1853). That must have been what was in the mind of the judge when he said that consent was immaterial.

Since appellant pleaded guilty, the conviction should not be quashed unless the Court is also satisfied that there has been a miscarriage of justice, that is, that appellant was in fact innocent. In *Verney* (above) the innocence of the prisoner was clearly proved by evidence before this Court.

[LUSH J.: If the Court which has to expound the law misstates it, that may constitute in itself a miscarriage of justice.]

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BRAY J.: We are all of the opinion that there has been a miscarriage of justice within the meaning of s. 4 of the Criminal Appeal Act. The first question is, would the jury, as the case stood, have been likely to convict the prisoner? In our opinion they would not; therefore, apart from his plea of guilty, there has been, *primâ facie*, a miscarriage of justice. The case of *Verney* which has been referred to is not on all-fours with this, because there it was proved to us that the prisoner was not guilty. Did the appellant really plead guilty to having taken the girl out of the possession of her parents? In our opinion he did not, because the Commissioner misstated the law. There had been a good deal said by him, the general effect of which seemed to be that he would have to tell the jury that what the prisoner was setting up was no defence to the charge, and that upon the evidence before them the jury would have to find him guilty. But the last thing the Commissioner said was clearly wrong: "What the girl has told, and truthfully told, amounts to your having taken the girl out of the custody of her parents. It is your keeping her secretly, preventing them from knowing." That is what he pleaded guilty to; he had kept her secretly, but he did not plead guilty to taking her out of the possession of her parents. That being so, the conviction must be quashed.

Conviction quashed.

A. L. B. T.

CHARLES THOMAS CRANE.

On an indictment for feloniously receiving stolen property, the jury must be explicitly directed as to what constitutes possession on the part of the defendant.

This was an appeal against conviction on a point of law, and an application to appeal against conviction on fact. Appellant was convicted of larceny, at the Hertfordshire Quarter Sessions held at St. Albans on January 2nd, 1912, and sentenced to three months' imprisonment with hard labour. At the previous October sessions the jury had disagreed.

Forrest Fulton for the appellant. Although the jury returned a general verdict of guilty in this case it was never suggested

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CHARLES THOMAS CRANE.

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by the prosecution that he was guilty of the theft, but of feloniously receiving stolen goods. The prisoner kept a coffee-house at Watford, and on July 6th, 1911, a man named Swan, who was a carman working for a well-known firm in Watford, stole from them a bag of meal and brought it on the prisoner's premises. Swan had been already convicted summarily, and at Crane's trial gave evidence for the prosecution that he took the meal to appellant's house.

Police-Constable Perry gave evidence. He was keeping observation on Swan, and followed him to the prisoner's house, where he saw Swan take the sack through the shop and put it on a table in the back-yard. Perry followed him immediately and asked Swan if he had permission to leave the meal; Swan answered, "I am only leaving it here till I can call for it." The prisoner also spoke simultaneously, but as Perry was listening to Swan he was not sure what the prisoner said. Later Sergeant Hewitt called at the prisoner's shop to make inquiries; Crane said Swan had never left any sacks there before, and invited Hewitt to search the house, which he did without result. Crane said, "When Swan left the sack he was going to call for it on the way back." Swan's evidence was that he took the sack to sell it if possible. The prisoner did not give evidence: I take the responsibility for that, as I thought there was no evidence to go to the jury.

I submit that there is no evidence that the prisoner received the property at all; some overt act of the prisoner must be proved; constructive possession would be sufficient, but there must be proof that he consented to the transfer of the property. *Pratt*, 4 F. & F. 315 (1865), shews that the mere fact that the stolen property is found on the prisoner's premises is not enough to confirm the evidence of the thief. On the evidence it would be impossible to find that the prisoner was even a bailee of the property.

There was no evidence that the prisoner knew the sack was stolen. Swan gave evidence of a conversation in the previous April, when the prisoner said he could do with a bit of meal, and asked him if there was any chance of his getting it. Nothing was said as to how Crane was to get it. This remark is more capable of an innocent than a guilty meaning; he knew Crane was travelling about as a carman and had better opportunities than himself for purchasing meal. There is not even any evi-

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dence that the prisoner knew that Swan was employed by a corn merchant.

The summing up was inadequate, and in one respect amounted to a positive misdirection. My submission that there was no case to go to the jury was rejected, but if there was any evidence it was of a most flimsy character, and there should have been a full explanation in the summing up as to what was necessary to constitute a guilty receiving of stolen property, and as to what corroboration was required of the evidence of the thief. The Chairman said the policeman's evidence was very fair corroboration that Swan took the meal and left it at Crane's house. There was no dispute as to that, and it was no corroboration in law; corroboration must be in some particular material to the issue.

[HAMILTON J.: In *Wilson, Lewis and Havard,* 6 Cr. App. R. 125 (1911), Avory J. said, "If the jury find part of an accomplice's story corroborated they are entitled to believe the whole"; and the Lord Chief Justice said, "It must not be supposed that corroboration is required amounting to independent evidence implicating the accused."]

Strictly speaking, corroboration is not required in law, but it is the universal custom to require it, and the phrase "some particular material to the issue" is generally used in directing a jury.

[BRAY J.: According to *Everest,* 2 Cr. App. R. 130; 73 J.P. 269 (1909), it must be some particular which goes to implicate the accused. The doctrine would be done away with if all that is required is to prove that the goods had in fact been stolen. I have in my mind a case in the Crown Paper, where an affiliation order had been made against the complainant's master. The corroboration relied on was that the girl had changed her room to one adjoining that of her master, and I think we held it was not sufficient, but there corroboration was required by statute.]

[HAMILTON J.: In *Blatherwick,* 6 Cr. App. R. 281 (1911), the Lord Chief Justice said, "*Everest* goes too far; *Wilson* is the correct statement of the law." See also *Dimes,* 7 Cr. App. R. 43 (1911).]

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The jury received no direction as to what constituted receiving—that there must be an assent on the part of the accused; nor as to what evidence there was of his having a guilty mind, there being in fact no evidence.

J. H. Murphy for the Crown. The only material point here is whether the sack was in the possession of the prisoner. It need not be actual physical possession; all the circumstances of the case must be looked at. The matter begins with the conversation in April, and the prosecution suggests that the sack was brought in pursuance of a previous arrangement. The fact that Swan came to the prisoner's shop at a time when there were not likely to be customers there must be taken into consideration.

There was evidence of guilty knowledge, namely, that there had been an assent to the goods being brought there, since he did not dissent from the false explanation given by Swan to the policeman, and, indeed, repeated it later in the day.

There was corroboration of every act Swan spoke to except the conversation in April, and the Chairman in his summing up called sufficient attention to the necessity for corroboration. Even if there was no direction to the jury as to what constituted receiving, this could not have affected the issue, since the question was fully dealt with by counsel in their speeches.

Fulton in reply.

LUSH J.. This is an appeal against a conviction for feloniously receiving a sack of meal, well knowing it to have been stolen. It is contended that there was no evidence that the property was in the possession of the appellant; that there was no evidence that he knew it had been stolen; and that there was misdirection on the questions of possession, and the necessity for corroboration of the accomplice's evidence. The case is in some ways peculiar; that the meal was in fact stolen by the other person there is no doubt. The thief took the goods through the defendant's shop, and into his back yard, with a policeman closely following him. He put the sack on a table in the yard close to which the defendant was standing, and in a few seconds the policeman interfered.

It is not necessary for the Court to express any view on the two first points, because the Court has come to the conclusion

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that there was not a proper direction in the summing up on the question of possession. It was a case in which it was highly important that the jury should receive an explicit direction as to what in law constituted possession, but this question was left to them without any direction at all. We do not think that the conviction is one which the Court ought to allow to stand.

Conviction quashed.

Solicitors for the Appellant—*W. T. Ricketts & Son.*

A. L. B. T.

CHARLES SMITH.

Severity of sentence.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted, on July 13th, 1911, at the Warwick Assizes, of feloniously receiving stolen goods, and was sentenced by Mr. Justice Ridley to five years' penal servitude.

D. W. Carr for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted with five other prisoners for housebreaking, four of whom lived in the same house as himself. The only evidence against him was that he had pawned a silver watch, one of the stolen articles, and he was found guilty of feloniously receiving stolen property. A detective then gave evidence and stated that little was known of the prisoner until he came to live at Hill Street, Coventry, about twelve months ago, that Langston, who was admittedly the principal offender, and four other prisoners were also living there, in February, 1911; that property taken in several other burglaries was found in his room; and that his house was a meeting-place for burglars, fourteen cases of housebreaking being traced to these prisoners. This statement was most unfair, as he was merely a lodger in the house; moreover, no opportunity was given him of cross-examining the detective. There are no previous convictions against him; he is thirty-five years old and has a wife and child; until recently he has been in

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regular employment; in his notice of appeal he gives the names and addresses of firms of good standing by whom he has been employed. Until Langston came to live at the house the prisoner led a blameless life. Langston was sentenced to ten years' penal servitude; another of the prisoners, Franks, was also sentenced to five years' penal servitude, but on October 16th, 1910, this Court reduced the sentence to one of three years' penal servitude (above, p. 23); Franks had had four previous convictions, so this sentence for a first offence was far too severe.

Maddocks for the Crown. I am only instructed to see that all the facts are before the Court. I do not know whether inquiries have been made of the firms by whom the prisoner says he was employed. Although there was no evidence against the prisoner of his having pawned other goods than the watch mentioned, still he was found guilty of acting in concert with the other prisoners, some of whom lived in the same house as himself, and with one of whom, Langston, he was on intimate terms.

HAMILTON J.. The prisoner has had leave to appeal against his sentence. He was convicted of feloniously receiving stolen goods, and sentenced to five years' penal servitude. There are no previous convictions against him, and he states, and the police have no information to the contrary, that he is a workman who has been in regular employment. The circumstances in which the crime was committed make it impossible for him to appeal to this Court against conviction with any hope of success; but there is reason for thinking that he was taken in by a more hardened criminal. There is some ground for the statement of the police that he was implicated in receiving more than the one stolen article as to which he was charged, but we are impressed by the fact that he was not invited by the judge to cross-examine the officer who gave information against him on this point. We are of opinion that the proper sentence would be one of twelve months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PHILLIMORE, MR. JUSTICE HAMILTON, MR. JUSTICE AVORY AND MR. JUSTICE LUSH.

ARTHUR WILLIAM MONK.

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Misdirection on part of the case for the prosecution is not a ground for quashing a conviction unless there has been "a substantial miscarriage of justice."
The Court may look at the depositions taken before the magistrate though they were not put in at the trial.

This was an appeal against conviction, by leave of the full Court. Appellant was convicted on 6th December, 1910, at the Birmingham Assizes, under s. 12 of the Debtors Act, 1869, of quitting England within four months before the presentation of a bankruptcy petition against him, taking with him property to the value of £20, which ought by law to have been divided amongst his creditors, and was sentenced by Ridley J. to twelve months' imprisonment with hard labour. The appellant was a wholesale butcher carrying on business in Birmingham, and on 12th April, 1910, finding himself in financial difficulties, he called a meeting of his creditors; they agreed to accept a composition of 4*s*. in the pound, which would have required £450. A statement of affairs got out by an accountant shewed assets amounting to £415, and the appellant hoped to raise the balance. Subsequently two large creditors came in, which increased the amount required; and on 19th April he had left the country; on 30th May he was arrested at Hamilton, Ontario. The appeal was argued on 22nd and 23rd January, 1912, before Bray, Hamilton and Lush JJ., who held that there had been misdirection as to a sum of £93, but ordered the case to be re-argued before a fuller Court, on the point whether there had been a "substantial miscarriage of justice."

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H. H. Joy for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The amount which the prisoner was charged in the indictment with having taken with him was £735; this amount was arrived at in the following way: an employee of the prisoner named Skirmer had a banking account in the London City and Midland Bank, Balsall Heath, but this account was in reality the prisoner's. Before the prisoner left England Skirmer cashed a cheque for £700, of which he gave the appellant £670; he also gave evidence that he bought furniture from the prisoner for £10, and book-debts for £25. It was, however, admitted by the prosecution that £500 was sent by the prisoner to a man named Mason, and £100 paid to a creditor named Yearp; further that, as the prisoner owed money to Skirmer for various small accounts, only £670 of the proceeds of the £700 chéque was handed to him. For the defence evidence was given that the prisoner paid £50 to his father for wages due to him, and £10 for passage money, leaving only about £9 as the amount which he took with him; the payment of £35 by Skirmer was denied, and my submission is that Skirmer's evidence on this point should not be accepted; it was inconsistent, and he contradicted himself both as to the amount of money he had in his house, and as to the manner and date of payment. This is shewn more clearly if the depositions are referred to, although they were not put in at the trial. [The Court said that it would look at them.]

I suggest that it was only after the cheque for £700 was cashed that he was able to pay for the furniture and book-debts, and that the £35 purchase money was included in the £670 cash handed to the prisoner. It is impossible for the Court to judge merely from the shorthand notes whether Skirmer was a credible witness. If I may refer to the opening of the prosecution before the magistrate, it will shew what opinion the solicitor for the prosecution had formed of him. [The Court refused to permit this.]

Evidence on behalf of the prosecution was also given by the assistant Official Receiver, who suggested a further sum of about £93 which the prisoner might have received before leaving England. That figure was arrived at in the following way. It was stated that between the 3rd and 6th April the prisoner bought animals from various dealers, paying for them with cheques which were subsequently dishonoured; claims had been

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put in in respect of them, amounting to £1,527, and from the prisoner's books and statements the witness was only able to trace and account for £1,414, and so came to the conclusion that the prisoner, on the assumption that he realised £1,527 for the animals, had a balance of £93 in hand. The prisoner stated that one of these cheques was a post-dated cheque, paid earlier than the 3rd April; it does not follow that he realised the price he gave for the animals, especially when he was on the verge of bankruptcy, and he gave evidence that some of the cattle had been condemned. In cross-examination the assistant Official Receiver admitted that the £93 was only surmise. In these circumstances this portion of the case ought not to have been left to the jury at all, whereas it was not only left to them, but they were misdirected on the subject. The jury may have disregarded the evidence of Skirmer as to the £35, and accepted the evidence of the prisoner's father as to the payment to him of £50, but still have thought that no explanation had been given of the £93, in which case there would be a substantial miscarriage of justice. The father's evidence on deposition should be accepted; it was given when he was not far from his death, and the fact that the payment to him may have been indefensible does not make it unlikely.

The onus was on the prosecution to prove that the prisoner left England with over £20, and if they proved that, it was open to prisoner to prove that in doing so he had no intention to defraud. The summing up is unhappily phrased, as it is put to the jury as if there were two alternative offences, and it was open to them to convict on the issue of leaving England with intention to defraud, without it being proved that he had £20 in his possession. The surrounding circumstances, especially the fact that he booked his passage under a false name, and wrote a letter which he had posted at Rhyl after he had sailed, with the object of leading his creditors to think that he was there, were such that the jury were very likely to find that he did intend to defraud. As to the £93, the figure is treated by the judge as though it were a proved figure, when it is purely hypothetical, and the onus of proof is wrongly put on the prisoner to disprove the possession of a sum which he had never been proved to have received. The Court ought not to come to the conclusion that the jury would have given the verdict they did if the matter had been properly left to them.

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H. B. Drysdale Woodcock (with him *C. L. Attenborough*) for the Crown: The conviction should stand. There were other grounds besides the evidence as to the £93 on which the jury could have acted, and probably did act, in coming to a conclusion; but the question as to the £93 was properly left to the jury, and the judge told them that it rested upon the argument of the prosecution, and not, as in the case of the other sums, upon actual proof that he had received the money; the summing up must be read as a whole. It was made clear that £1,527 was not money, but the value of the cattle bought by the prisoner, and for which he must be presumed to have paid and received a reasonable price. It is regrettable that the speeches of counsel on both sides are not reported; a summing up is really only intelligible in the light of the speeches made.

[THE LORD CHIEF JUSTICE: We cannot have the speeches reported, but we always assume that the summing up is directed to the points made in counsel's speeches.]

There was no reason why the jury should not have believed Skirmer as to the £35; if there was any discrepancy in his evidence it was only as to whether he received the £700 from the bank before or after he paid appellant the £35. The jury were more likely to accept Skirmer's evidence than that of the prisoner, who, from his method of departure secretly and in a false name, and the letter posted at Rhyl, was obviously a discredited witness. No suggestion has ever been made why they should believe Skirmer as to one part of his evidence, which was in the appellant's favour, and not believe him as to the £35.

The story that the prisoner paid £50 to his father was one which the jury were entitled to disbelieve. The onus was on the prisoner to prove this payment, and though he stated that his father was entitled to wages of £3 weekly, no such suggestion was made by the father himself, nor had the prisoner previously ever paid him more than a few shillings.

The jury were invited by the defence to believe that the prisoner had lived in America for five weeks on £9, of which at least £2 was spent in travelling. This was just the kind of evidence the jury might have refused to accept, and, coupling it with the other

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evidence, they may well have come to the conclusion that the prisoner must have had over £20.

Joy: As to the amount the prisoner lived on in America, the evidence for the prosecution was that he was destitute when arrested, and had been sent a small sum of money by his brother who lived in Canada.

The Crown has not discharged the onus of satisfying the Court that, even if the jury had not had the matter put before them as it was, they must still have found the same verdict; see *Fisher* [1910] 1 K. B. 149; 97 L. J. K. B. 187; 102 L. T. 111; 3 Cr. App. R. 176; 74 J. P. 104; 26 T. L. R. 122 (1909), where Channell J. said, "In the circumstances of this case we cannot come to any other conclusion but that the jury may have been influenced by the evidence of the other cases, and, therefore, although there was sufficient evidence to convict the prisoner without the evidence as to the other cases, in accordance with the rule laid down in this Court, the conviction cannot stand." See also *Cohen and Bateman*, 2 Cr. App. R. 197; 73 J. P. 352 (1909); and *Bloom*, 4 Cr. App. R. 30; 74 J. P. 183 (1910). The Crown cannot be said to have discharged the onus when the general tenor of the summing-up is borne in mind; in view of which it is not clear that the jury did not convict the prisoner of general fraudulent conduct.

PHILLIMORE J.: The appellant appeals against his conviction at the Birmingham Assizes under s. 12 of the Debtors Act, 1869. [The learned judge read the section.] There are two issues to be tried: in the first place the Crown has to prove that the bankrupt quitted England with £20, or more, in his possession; unless the Crown succeeds in that the prosecution fails. If it succeeds it is possible for the prisoner to bring evidence that he had no intention to defraud. These are the two matters which may have to be decided. In the opinion of the Court there has not been in this case "a wrong decision of any question of law"; I use these words advisedly, for the word "misdirection" is not used in the statute. But the statute gives a right of appeal when the Court thinks that on any ground there was a miscarriage of justice, and it may be that a mis-statement of facts in the summing up might be so serious that the Court might think that the jury might not have

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found the verdict they did if the matter had been properly put before them. In *Stoddart*, 2 Cr. App. R. 217; 73 J. P. 348; 53 S. J. 578; 25 T. L. R. 612 (1909) the Lord Chief Justice said, "We think it is open to consideration whether the word 'must' is not too strong, and whether the proper question is not, whether if properly directed the jury would have returned the same verdict." In *Cohen and Bateman* (above), Channell J., distinguishing a case where there has been no wrong decision of a point of law, but only error in the presentation of the facts in the summing up, from a case where there has been a wrong decision of a point of law, says: "If, however, the Court, in such a case, comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events, no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due, to some extent, to such an error of the judge, not being a wrong decision of a point of law."

The summing up has been especially attacked in respect of a figure of £93, and we agree that the judge considerably overstated the force and cogency of the evidence given regarding this figure. There was no such actual sum; the utmost that could be said was that the prisoner had bought animals which were worth a considerable sum of money, as tested by the price he had purported to give for them, and had disposed of them. It was suggested that he was short by £93, but the prisoner may have discharged part of the onus as to this sum by his statement that some of the animals were condemned, and that one cheque received was in respect of an earlier transaction. The presumption is that, unless a man is on the eve of bankruptcy, he would make a considerable profit on animals so bought and sold, but he may make a loss. The utmost that can be said is that, if the animals fetched as much as was given for them, the prisoner must be presumed to have been about £90 short. We do not say this was no evidence for the jury, but it was put by the judge in his summing up much too definitely.

But it was only one of four ways in which the prosecution sought to make the case against the prisoner; there was the £35 which Skirmer said he had paid him, there was the £50 which the appellant had to account for by stating that he had paid it

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to his father, and there was the further difficulty of leading the jury to believe that he lived for five weeks in America on £9. If the Crown satisfied the jury on any one of these points it was sufficient to convict the prisoner. If the jury had been properly assisted, and the evidence properly stated to them, we do not think they would have come to any other decision than that which they did. In these circumstances the conviction must stand.

Appeal dismissed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HAMILTON AND MR. JUSTICE LUSH.

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SIDNEY BERTIE HOPKINS (*a*).

Conviction quashed in view of fresh evidence.

This was an appeal against conviction, leave having been granted by the full Court.

Appellant was convicted of larceny, on 21st December, 1911, at the Swansea Borough Sessions, and was sentenced to eight months' imprisonment with hard labour. He had subsequently been released by order of the Home Secretary.

Ralph Sutton, for the appellant (under s. 10 of the Criminal Appeal Act), who was present, but not in custody, called

Holland Hutchings: On 21st November, 1911, I went to the cloak-room of Swansea Grammar School and took from it two overcoats which I sold the next day, one to Duffy. On 12th January, 1912, I confessed to Inspector Roberts that I had committed the crime, and I subsequently identified the overcoat sold to Duffy out of several which he shewed me. (No cross-examination.)

Trevor Hunter, for the Crown, did not address the Court.

THE LORD CHIEF JUSTICE: In this case evidence has been brought which the prosecution do not question, and which shews that a mistake has been made. The real thief having confessed, and there being no reason to doubt his statement, the appeal must be allowed and the conviction quashed.

(*a*) See p. 109, above.

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Sutton: May I apply for costs on behalf of the solicitors who instructed me in the application last week? They acted for the appellant at his trial, and the inspector communicated with them when Hutchings confessed. Although the funds of the prisoner were exhausted, they thought it proper to bring the matter before this Court.

THE LORD CHIEF JUSTICE: We cannot assign a solicitor after the conviction has been quashed. The solicitors acted quite properly, but there is no reason to think that the inspector would not have reported the circumstances to the Treasury.

Conviction quashed.

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Misdirection without miscarriage of justice.
Severity of sentence.

This was an appeal against conviction by leave of Ridley J., and an application for leave to appeal against sentence. Appellant was convicted, on 6th January, 1912, at the Middlesex Sessions, of feloniously receiving stolen goods, and was sentenced to eighteen months' imprisonment with hard labour.

Lawless for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant, a man known as "Hoppy," and a boy, Pearcy, were charged together with stealing twelve sheets from the Percy House School at Isleworth, and there was a second count for receiving. "Hoppy" was acquitted; Pearcy and the appellant were convicted of receiving. Evidence was given that Pearcy had made the following statement to the police:—"Mrs. Court and me stood in the alley, and 'Hoppy' threw the things over. She tied them up, and I carried them." In the summing up the jury were told that this statement was reiterated in the presence of the appellant, and that with regard to her the statement was "of no special value

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unless there is some corroboration of it." This was a misdirection, for the statement was only made once, and was never made in the presence of the appellant. It was not evidence against her, whether corroborated or not.

Secondly, the appellant was under the influence of "Hoppy," with whom she was living as his wife. If she had been his wife, the law would have presumed that she acted under his coercion; this presumption should apply in the present case as if the appellant had been his wife. At any rate, the jury should have been invited to acquit, if they thought that she was acting under the influence of "Hoppy."

The sentence is too severe. The appellant only wants to get away from this man to lead an honest life.

Roland Oliver for the Crown The misdirection had no effect upon the jury. Pearcy's statement dealt with stealing, not with receiving, and further, the Chairman discounted its effect by saying that it was of no value unless corroborated, and that it was not corroborated. The jury convicted not of stealing, but of receiving, upon which the direction to the jury was right. There was no miscarriage of justice. The sheets were stolen on the 24th November; the appellant pawned three of the stolen sheets on the 25th November. The markings had then been torn off, and the sheets had been hemmed up to conceal the cutting. This must have been done by the appellant or in her presence.

When the detective came to search the house, the appellant said to him, "'Hoppy' got them from a school at Isleworth. The rest are all pawned." On these facts the jury would certainly have convicted the appellant. Further, in her notice of appeal, the appellant admits that, on 25th November, Pearcy told her that "Hoppy" had stolen the sheets.

Lawless: The jury would not have convicted without Pearcy's statement.

The LORD CHIEF JUSTICE: The jury were practically told to act on a statement made in the absence of the appellant. This statement was treated as evidence against the appellant, the only criticism being that it was not corroborated. As it was made by one of the prisoners and could not be excluded, it was all

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the more necessary to tell the jury that it was not evidence at all against the appellant. The summing up, therefore, contains a misdirection.

This raises the question whether the Court should dismiss the appeal under the proviso to s. 4 (1) of the Criminal Appeal Act. Before doing so, the Court ought to be satisfied that the jury would have convicted the prisoners supposing that there had been no misdirection.

What happened in this case? The sheets were stolen on the 24th November; on the 25th November the appellant pawned three sheets. The markings on these sheets had already been cut out, and the sheets had been sewn up so as to conceal the alteration. On 27th November the appellant said to the detective: "I have no pinched stuff here; you can come and have a look if you like." The detective searched and found three sheets, and two parts of sheets in pieces on the bed. The appellant said: "'Hoppy' got them from a school at Isleworth. The rest are all pawned." The sheets were identified as part of the stolen property.

On these facts I have no doubt whatever that the jury would have convicted the appellant, and it is impossible for the Court to say that there has been a miscarriage of justice. The test laid down by this Court is whether the jury, on a proper direction, would have convicted.

It has been urged that the appellant ought in some way to be given the benefit of the rule that a wife committing a crime in the presence of her husband is presumed to have acted under his coercion. I am not certain that this rule of law is beneficial in the administration of justice. It certainly ought not to be extended.

The appellant was convicted about a year ago and sentenced to twelve months' imprisonment with hard labour, and her sentence was reduced by this Court to six months (see 6 Cr. App. R. 121). After being away from the man for those six months, she has voluntarily returned to him and has committed this crime. We think that the sentence in this case is not too severe.

Appeal dismissed.

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A summing up need not go through the evidence, especially where counsel on both sides have dealt with it exhaustively.
Severity of sentence.

This was an appeal against conviction by leave of Ridley J.; there were also applications for leave to appeal against sentence, and to call further evidence. Appellant was convicted at the Stafford County Sessions, on January 4th, 1912, of feloniously receiving stolen goods, and was sentenced to eighteen months' imprisonment with hard labour.

Disturnal for the appellant, who was present. The prisoner is a metal refiner and brass caster, and he was indicted with one of his employés, named Bliss, for receiving thirty-six ingots of tin which had been stolen by two men, Fletcher and Sproston. The two latter had been seen by the police, early on the morning of December 1st, 1910, driving a cart into the appellant's yard, and the stolen ingots were soon afterwards found in his foundry. The defence was that the prisoner had not in fact received the stolen metal, was not present when it was deposited on his premises, and did not know of its presence there until he was arrested. It was suggested that the thieves deposited the metal there when they realized that they were being followed by the police. The prisoner had been to the works at an early hour in the morning, but said he went home to get a cup of tea, and returned just as the police arrived on the scene. Evidence was given by two police constables, who were concealed near the premises, but their evidence is not inconsistent with the prisoner's story. When they came to the premises they saw Fletcher come out of the foundry, followed by the prisoner and Bliss. The only real evidence against the prisoner was that of Superintendent Rowbottom, who said he saw him helping to unload the ingots from the cart, but this was three-quarters of an hour before sunrise, and the men were in a yard shaded by a high wall and the foundry.

The grounds of this appeal are that on two points, on which evidence was given, and which were considerably discussed, there was an absence of direction by the Chairman, with the result

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that the jury could not fairly consider what was the real defence. In the first place, evidence was given that two rolls of cambric, which had been stolen, were found on the prisoner's premises. The prisoner gave an explanation of its presence, and had tried to find the man from whom he said he obtained it to give evidence, but he had gone abroad. This evidence was only admissible under s. 19 of the Prevention of Crimes Act, 1871, "for the purpose of proving that such person knew the property was stolen, which forms the subject of the proceedings against him." That was not the issue raised in the defence; the question was whether the prisoner had received the goods at all. While the prosecution were entitled to give the evidence, since they did not know whether this issue was to be raised or not, and I could not have objected to it, as the issue was not raised the Chairman in his summing up ought to have told the jury that they must disregard it. This evidence must have seriously prejudiced the jury against the prisoner.

In the second place it was clearly shewn that the police had laid their plans with great precaution to watch the foundry, and counsel for the prosecution in opening the case to the jury said. "For some reason, you may perhaps divine what it was, the police were watching the foundry"; the suggestion was that it was a place where it was the custom to receive stolen property. I complain not so much of the remark itself as of the absence of direction by the Chairman on the point; he ought to have told the jury that they must not be influenced by the fact that the police had suspicions.

The following was the summing up in full:—"This case has occupied ten hours, out of which two hours have been occupied, necessarily I think, by most able and exhaustive addresses. The addresses have been so exhaustive that I do not propose to sum up in the ordinary way, and go through the evidence. All that I have to remind you that has not been touched upon very prominently is the fact that you are trying two prisoners, and I think it is scarcely possible considering their position, one as employer and the other as servant, you can look upon them—if you have to find them guilty—as equally guilty." The omissions amounted to a misdirection, and if the points had been properly put before the jury they would probably have given a different verdict. It is true that I did not at the end of the

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summing up suggest that the Chairman should refer to the points: I did not consider it respectful to do so.

As to the application for leave to call further evidence, I do not think the evidence suggested would help the prisoner.

The sentence was too severe; the prisoner had left the army with an exemplary character, but evidence was given by the police that his conduct had been unsatisfactory in the employ of four firms since 1892; this evidence was merely hearsay, and the prisoner disputes the facts altogether.

V. G. Milward, for the Crown, was directed to confine himself to the question of sentence. Representatives of two of the firms mentioned were in Court at the trial, and would have been called if the facts deposed to by the police had been questioned by the defence.

HAMILTON J.: Arthur McDougall appeals, by leave of Ridley J., against his conviction for feloniously receiving stolen goods, and he also applies for leave to appeal against his sentence; the application for leave to call further evidence has not been proceeded with. The grounds of the appeal are that the Chairman's remarks to the jury were so brief that they amounted to a material misdirection. There was in this case a long trial with careful cross-examination on both sides by counsel who are of the first rank on the circuit, and two hours were occupied by their able speeches, which dealt with the issues raised so exhaustively that the Chairman told the jury that he did not propose to go through the evidence. Without suggesting that it is proper to leave the direction of the jury to counsel, we cannot concur that there are no circumstances in which, in the interests of the prisoner as well as the jury, it may be desirable to leave the matter in the hands of the jury without endeavouring to review the case in every way. This case, although involving serious issues of fact, was in its nature plain. Thirty-six ingots of tin of considerable weight were stolen by Fletcher and Sproston; the police, who had been put on the alert, saw them driving a cart containing the ingots in the direction of the appellant's works, the appellant being a man who purchased scrap metal and melted it down. A superintendent of police followed the cart on his bicycle; it was early morning, and there was ample

room for dispute whether there was sufficient light to enable him to see what was going on, but he said that the cart proceeded to the appellant's yard, and that he saw four men, of whom the appellant was one, lifting the ingots out of the cart and carrying them into the foundry. The superintendent cycled past the works, met the two other policemen, and returned followed by them. He found the cart coming out of the yard, and saw the appellant and Bliss follow it and stand on the footpath looking round. Evidence was given which corroborated the suggestion that the appellant was taking an active part in the proceedings. The furnaces were in full blast, the crucibles empty, and the ingots were lying on the floor, some of them being actually on the weighing machine. Although straightforward answers were given by the prisoner to the superintendent's questions, there was a strong case for a jury of practical men without any direction of law. The defence set up was that the prisoner had only just returned from his breakfast; that the ingots had been carried in shortly before his arrival, and that he never saw them until after he saw the police. This was the issue fought at the trial, whether he ever received the ingots; it was clearly a matter for the jury to decide, and little or no direction was required. It is said, however, that by way of preventing the minds of the jury from being influenced improperly, they ought to have been directed as to what was the real point at issue; that their minds might have been diverted by the fact that counsel for the prosecution had said that the police were on the watch, and that the jury might guess why. It appears somewhat a counsel of perfection that the Chairman should pass the whole case through a sieve and refer to everything which might possibly affect the jury's mind, and the observation on this point appears to us hypercritical.

The other point raised is as to the evidence given that property stolen within the preceding twelve months had been found on the prisoner's premises. The evidence was admissible, and at the time it was given the Chairman remarked that there was no charge against the prisoner of stealing the cambric. Counsel for the prosecution then directed the attention of the bench to the law on the subject, and read s. 19 of the Prevention of Crimes Act, 1871, including the words "for the purpose of proving that such person knew the property to be stolen, which

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forms the subject of the proceedings taken against him," and the Chairman said, "So long as the jury understand, it is all right;" so the jury had a correct statement of the law made to them when the matter was fresh in their minds. Can it be said that they were likely to have been misled? It appears to us that omission to direct cannot be shewn, even if direction was necessary. Neither side seems to have thought that any harm was done, because the Chairman was not asked to comment on these points, as he might have been asked to do before he left the case to the jury. We feel that the course taken by the Chairman was not open to exception, and was taken in the interest both of the prisoner and the jury, and therefore we cannot interfere with the conviction.

As to the sentence, some matters were introduced as to the appellant's character which he now says were ill-founded. We are told that witnesses were in Court prepared to corroborate the statements of the police, but as these statements were not cross-examined to they were not called. It does not appear that these matters affected the Court, for the sentence was not excessive for the offence of receiving stolen metals when the prisoner's business, which included the smelting of metals, was one which made that theft possible and lucrative.

Appeal dismissed.

Solicitors for the Appellant—*Rhodes & Son*, Wolverhampton.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HAMILTON, AND MR. JUSTICE LUSH.

SYDNEY AUGUSTUS WANN.

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Insufficient direction or omission to direct on a material point is a misdirection leading to "a miscarriage of justice" where it is reasonably probable that on a full direction the jury would not have convicted.

The test whether a direction upon a question of fact is sufficient is (semble) *whether the Court, if it had the power, would grant a new trial, on the ground that further enquiry is desirable.*

This was an appeal against conviction by leave of Ridley J. Appellant was convicted on January 16th, 1912, at the Cambridge Assizes, of an indecent assault before Channell J., and was sentenced to eight months' imprisonment with hard labour; he was allowed bail.

H. St. John Raikes, for the appellant, who was present. The appellant is an unregistered dentist, and he lived with his mother and sisters. The assault was alleged to have been committed on a girl, aged thirteen, named Emily May Beeson, who lived with her mother next door to the prisoner. The families were acquainted, and the prisoner visited at Mrs. Beeson's house. The evidence for the prosecution was that on September 8th, 1910, the girl went to the prisoner's surgery, wearing a light-coloured dress of rather unusual appearance, to have a tooth attended to, and that while there the assault took place. She made no complaint, and returned to the surgery for further treatment to her tooth the same afternoon. She made no mention of the offence until questioned by her mother some two months later, and then at first only referred to another suggested offence. The dress which she was alleged to have been wearing at the time of the assault was examined by a doctor on November 17th, and found to be stained in a manner consistent with her story.

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There was no satisfactory corroboration of the girl's story. When she made the statement to her mother it was not a voluntary complaint, and, made after an interval of two months, it cannot possibly be considered corroboration. The only other corroboration suggested is the evidence of the stain on the girl's dress, but this is no corroboration, because its connection with the prisoner depends entirely on whether the girl's story was true. The evidence of the girl's mother shewed that she did not wholly believe her daughter's story, for after the first accusation of an act of indecency by the prisoner, she sent to ask if he was not coming to her house for a card party, and when told the present story, she sent the girl in alone to tell the prisoner's mother. The girl did not call out at the time of the assault, although she knew the prisoner's mother and sisters lived in the house. On the case for the prosecution the evidence was very slight, and it would take little to turn the scale.

For the defence it was alleged that the girl did not come to the surgery at all on September 8th; it was common ground that she only came on one day, and the prisoner's diary contained an entry under the date September 22nd: "Miss May Beeson, tooth stopped and extracted." The girl fixed the date by saying that she wore the light dress for the last time on that day, but she was not asked how she came to fix wearing the dress on September 8th. The case for the prosecution was that the girl's brother was not at home on that day, but the prisoner and his mother both spoke to seeing and hearing him on the wall dividing the two gardens while the girl was in the surgery. The prisoner's mother and two sisters all saw the girl on the day she visited the surgery, and they gave evidence that she was not wearing the light dress, but a dark green one. This was a school dress she was in the habit of wearing, and she began to attend school again on September 13th. Further, the girl stated that her first visit to the surgery was at 2.30 p.m., while the evidence for the defence placed it at 4.30 or 5.0 p.m. The latter would be a more likely time if the girl was attending school at the time.

The judge, in his summing-up, did not sufficiently direct the jury as to the importance of the question of date. He told them that but for the evidence of the stain on the dress, he would have told them it was not a case in which they could safely convict, bearing in mind the girl's conduct; then he dealt with the entry

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in the diary on September 22nd, and told them that he was satisfied that this was not a false entry, and added: "That is a matter of some importance, because it goes to destroy a good deal of the evidence for the prosecution if the date really was the 22nd, and, of course, the date is important, as I have told you, because of the probabilities about the dress being worn." He should have told them that since the stain on the dress was the only corroboration, and as the evidence for the prosecution was that the dress was not worn after September 8th, unless they were satisfied that the visit to the surgery was on that day, it was their duty to acquit the prisoner. This omission was so material that it amounted to misdirection, and the verdict should be quashed.

Secondly, the verdict was unreasonable. If it was based on the view that the 8th was the true date of the visit, that view was against the weight of evidence. The 8th was the day sworn to by the girl herself, but she was considered untrustworthy even by her mother, and her evidence with regard to the plush chair having been stained was disproved by expert evidence. On the other hand, the evidence in favour of a later date was very strong, and clearly seems to have convinced the judge. Thirdly, the fact that the girl returned to the surgery and made no complaint points to consent. The judge told the jury that I did not make consent my defence. That was so, but I guarded myself by pointing out to the jury that if they accepted the girl's story, her own admissions were evidence of consent.

[The LORD CHIEF JUSTICE: It may be that in many cases counsel are not bound to call attention to misdirections when they are made. But when a judge has said in the hearing of counsel, and without any objection from him, that a particular defence, say, consent, was not intended to be raised, the appellant cannot, in ordinary circumstances, rely on that defence on appeal. Moreover, in this case consent is inconsistent with the defence that the appellant did not commit the act complained of. It is in the discretion of counsel whether inconsistent defences should be raised. In cases of this kind it is of great importance that the prisoner should be defended by counsel.]

F. North, for the Crown. There was evidence on which the

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jury could find the prisoner guilty, and the verdict must stand. This Court will not try the case again, *Williamson*, 24 T. L. R. 619; 1 Cr. App. R. 3 (1908). The stains on the dress were corroboration of the girl's story, and the story was one which a girl such as she appeared to be could not have invented. There was no suggestion that anyone but the appellant was the culprit. The absence of complaint is intelligible seeing that he had not hurt her in any way; her return to the surgery is explained by the fact that she had toothache. As to the date, the absence of any entry in the diary for the 8th is not conclusive that there was no visit on that day, and the entry for the 22nd may have related to an appointment which was not kept, or it may have been made later. The jury may have disbelieved the appellant's witnesses and have accepted the 8th as the true date of the visit.

Raikes: At the hearing before the magistrates the appellant said that the visit took place about September 8th. He would not have said so if he had already forged an entry in his diary for the 22nd. He had no opportunity of forging the entry after the hearing, because from that time the diary was in the custody of the solicitors.

The LORD CHIEF JUSTICE: The wording of s. 4 (1) of the Criminal Appeal Act creates a great difficulty in such a case as the present, and it is open to question whether the Act does not require to be amended. In this case the verdict is not, in our opinion, unreasonable, and is not one that cannot be supported, having regard to the evidence. There has not been a wrong decision of any question of law. Therefore, the only clause under which we can deal with the case is the clause relating to miscarriage of justice. But we are not satisfied that there has been a miscarriage of justice here in the ordinary sense that the appellant has been wrongly convicted. There has been an insufficient direction upon a question of fact which makes a further enquiry desirable, but we have no power to grant a new trial.

In a summing up the facts may not be stated fully or may be stated incorrectly, without a misdirection on any question of law. A mere misstatement is clearly not a misdirection when the case has been fully heard by the jury, and as to omission, we must be satisfied that it is such that it is reasonable and probable that the

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jury were misled, in which case there might be "a miscarriage of justice." But the objection of omission seldom succeeds. As I said in delivering the judgment of this Court: "One has to be very careful in dealing with a case of alleged misdirection to appreciate the lines on which a case is conducted, as omission to direct the jury on a point which was not taken at the trial may not matter if no injustice is done" (*Meyer*, 1 Cr. App. R., at 11; 1908). The effect of the cases on this subject is stated in Ross on The Court of Criminal Appeal, at p. 113, as follows: "To have any effect in itself the misstatement of the evidence, or the misdirection as to the effect of the evidence must be such as to make it reasonably possible that the jury would not have returned their verdict of guilty if there had been no misstatements." With the alteration of the one word "possible" to "probable," we think that this statement is correct. In the summing up in this case there was no misstatement, but the jury were not fully directed as to the importance of the question whether the girl's visit to the surgery took place on the 8th or on the 22nd of September, and we have to consider whether we are reasonably satisfied that if there had been a fuller direction on this question, the jury would have returned a verdict of guilty.

The appellant was charged with an indecent assault of a gross character upon a girl, and there was evidence which corroborated the girl's story in a substantial manner. The assault was alleged to have been committed on September 8th, on the occasion of a visit by the girl to the appellant's surgery. It was common ground that she only visited the surgery on one day, and there was an entry in the appellant's diary from which it would appear that the day was the 22nd and not the 8th. According to the evidence for the prosecution, the light dress, the condition of which was the corroboration relied on, was put away in a wardrobe on the 8th, and could not have been used on the 22nd. The appellant's mother said that when the girl came to the surgery she was wearing a dark dress. There was also the incident of the presence of the girl's brother on the wall, and his using an expression about the girl squealing. That could not have occurred on the 8th, because the boy was then away from home. The judge's opinion was, as he has reported to us, that the 22nd was the true date, and his summing up was in favour of the appellant on that point. It

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is remarkable that the appellant himself before the magistrates spoke of the visit as having occurred about the 8th. If it were clear that the jury accepted the 8th, as they may have done, their verdict would have to stand. But they may have accepted the 22nd, and if the 22nd was the date, the light dress could not have been worn on the occasion of the visit, and the corroboration of the girl's story disappears. It would have been better if the judge had pointed out more fully to the jury what the consequences would be if they accepted the appellant's date of the visit. The verdict might not have been the same if those consequences had been sufficiently brought to their attention. It is more important that an innocent person should not be convicted than that a guilty person should go free. The difficulty of this case is very great, and we only give this judgment after very great doubt and hesitation. The Court is of opinion in this particular case that the conviction must be quashed.

Conviction quashed.

Solicitor for the Appellant—*S. J. Miller*, Cambridge.

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WILLIAM HENRY PHILPOT.

Murder.

The Court will not entertain a case for the appellant inconsistent with the defence set up at the trial.

A verdict that the prisoner "killed" the deceased "without intending" to do so is incomplete, and the judge may properly direct the jury to reconsider it.

This was an appeal against conviction on a point of law. Appellant was convicted on 1st February, 1912, at the Central Criminal Court, before Ridley J., of murder, and sentenced to death.

George Elliott, K.C. (with him *S. H. Lamb*), for the appellant, who was present. The appellant was a tram conductor; he had been married twelve years, and lived on terms of great affection with his wife. On January 9th, 1912, he and his wife

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were at home and were discussing a children's party which they intended giving on the following Friday. A question arose as to which of them should pay for the Christmas tree; the wife said that as she had bought the ornaments, he ought to pay for the tree; he replied that as she had worked a day longer that week than he, she could pay for it herself. An altercation ensued, at which the wife reproached him with an act of infidelity committed five or six years before, and long since forgiven; he said, "Don't shout; you don't want all the neighbours to hear;" she said, still louder, "I am not shouting;" then, to use the appellant's own words, "something seemed to snap in my head, and I jumped up and caught her by the throat. I lost control of myself altogether. I did not know what I was doing exactly; I felt as if I was holding a very strong galvanic battery, and wanted to leave go, and could not." He let go, and she fell; he then realised what he had done. He held a mirror to her mouth, and found that she no longer breathed. His first impulse was to kill himself, but he refrained because of his children; he telegraphed for his father, and when his father had arrived he gave himself up to the police.

At the trial the jury found "that the prisoner killed his wife; that he was sane at the time; that he acted in a fit of temper without intending to kill her." The judge asked them in what sense they used the words "without intending to kill her"; the foreman replied, "The jury are unanimously and emphatically of opinion that at the moment of the act the prisoner did not realise the consequences of what he was doing." The judge then directed the jury to reconsider their verdict, saying that a man is held to intend the consequences of his act. The jury finally found the appellant guilty of murder, and strongly recommended him to mercy.

The findings of the jury shew that the offence proved was not really murder, but manslaughter. It is one of those cases where a man under slight provocation does an act which proves fatal, though he did not use a deadly weapon, nor intend to kill. In such cases the slight provocation has frequently been held to reduce the offence from murder to manslaughter.

[The LORD CHIEF JUSTICE: Has that doctrine ever been applied where death was the direct consequence of the act complained

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of? It is not the same as if the act had been a push which unexpectedly caused a fatal fall.]

The principle is the same. Here the prisoner did not intend to kill or even to do grievous bodily harm; he may have put his hands on her throat merely to silence her.

I also suggested to the jury as an alternative view that he was provoked, and may have put his hand to her throat merely to stop her shouting. The jury accepted my suggestion. After the finding that he did not realise the consequences of his act, a verdict of murder cannot be sustained. Malice is essential in murder, and the jury have negatived malice expressly; after that finding it is impossible to presume malice. Cases where the question of malice is open are quite different.

Secondly, the judge was wrong in not accepting the first verdict. The first verdict was not ambiguous, which alone might give him the right to refuse to accept it; it was a lawful verdict which the judge could have accepted, and therefore he ought to have accepted it. See *Yeadon and Birch*, 31 L. J. M. C. 7; L. & C. 81; 7 Jur. (N.S.) 1128; 5 L. T. 329; 10 W. R. 64; 9 Cox C. C. 12 (1861), and *Rutter*, 1 Cr. App. R. 174; 73 J. P. 12 (1908). The first verdict was a complete verdict of manslaughter.

R. D. Muir (with him *Leycester*) for the Crown. The word "manslaughter" was never mentioned at the trial; there was no evidence on which a judge could properly have directed a jury that they might find a verdict of manslaughter. According to the doctor's evidence, the wife's strangulation must have lasted five minutes; it was so violent that a bone in her neck was broken. She was a woman of slight physique.

[LUSH J.: On this indictment the jury were entitled to find manslaughter; they found that he did not intend to kill.]

They meant to negative actual malice; they did not mean that the act was unlikely to cause death.

[LUSH J.: The jury very reluctantly found murder, and only

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after a direction that a man is held to intend "the consequences" of his act. Is that not a misdirection, and an important one?]

The judge meant probable consequences; his meaning was obvious: he was speaking of strangulation of the kind described by the doctor. The appellant did an act which was likely to cause death, and did cause death; that was murder. Even if the jury had intended to find manslaughter, such a verdict need not have been accepted; see *Meany*, L. & C. 213; 32 L. J. M. C. 24; 8 Jur. (N. S.) 1161; 7 L. T. 393; 11 W. R. 41; 9 Cox C. C. 91 (1862), and the Hammersmith ghost case referred to by Pollock C.B. in that case (see L. & C. at p. 216).

Elliott, K.C., in reply.

The LORD CHIEF JUSTICE: The powers of the Home Secretary with regard to the prerogative of mercy are expressly reserved by the Criminal Appeal Act. This Court has only to administer the Act. In this case a question is raised under s. 5 (2) of the Act whether the jury must have been satisfied of facts which proved the appellant guilty of manslaughter, and not of murder. That is the question which we, as a Court of Appeal, have to decide.

The only real issue before the jury was whether the appellant was sane or insane when he killed his wife. The jury found that he was sane. It would be a great danger if people could conduct cases on one line in the Court of first instance, and, when that was unsuccessful, conduct them on another line in the Court of Appeal. No case ought to be urged in this Court which is inconsistent with the case set up in the Court below. I have no doubt that, if there had been any evidence of the appellant's acts being consistent with manslaughter by a sane man, my brother Ridley would have mentioned it in his summing up. If a case had been made that the appellant only intended to silence his wife it would be different. But the appellant himself never said that. He said that something seemed to snap in his head, and he jumped up and caught her by the throat. And afterwards he said that he had murdered her. There was no evidence on which a verdict of manslaughter could properly be found. The jury found that he killed her in a fit of temper; they added that he did not realise the consequences of his act, but they cannot have meant that he

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began to do a harmless act, or one but little blameworthy, which afterwards developed into something causing death. They must have meant that the failure to realise the consequences was due to the fit of temper. In the circumstances it was not a misdirection to tell the jury that a man is held to intend the consequences of his act. The only act in question was that which caused death, and the appellant who committed this act, if sane, must be held to have intended that consequence. It is not possible to say that, without evidence, this Court can reduce the crime from murder to manslaughter.

Appeal dismissed.

Solicitors for the Appellant—*Mann and Crimp.*

A. L. B. T.

BEFORE

MR. JUSTICE CHANNELL, MR. JUSTICE HAMILTON, AND MR. JUSTICE AVORY.

MYER ABRAMOVITCH.

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Murder.

When it is clear from the cross-examination on behalf of the prisoner that the defence will be insanity, and it is ascertained that no witnesses will be called to prove it, it is the proper practice for the judge, at the close of the case for the Crown, to allow medical evidence as to the prisoner's sanity to be called.

This was an appeal against conviction on points of law. Appellant was convicted at the Central Criminal Court before Ridley J., on February 8th, 1912, of murder, and was sentenced to death.

A. W. Elkin for the appellant. The appellant was indicted for the murder of Solomon Milstein and Annie Milstein, but the indictment in respect of Annie Milstein was not proceeded with. The Milsteins kept a restaurant at Spitalfields. Their custom fell off owing to a strike in November, 1911, and from that time onwards part of the premises was used for gambling. On the 26th December gambling was going on till about 11 p.m. About 3.45 a.m., on 27th December, a person who lived above the restaurant heard groaning in the room below. The alarm was given, and the bodies of the two Milsteins were found. At 1.30 a.m., on 28th December, the appellant was seen by a friend at the corner of Commercial Road and Leman Street, and after some conversation they both walked towards the police station. The friend called the police and the appellant was arrested. He was then wearing the clothes of the dead man over his own, and two watches and a purse of money belonging to the dead man were found upon the appellant in the pockets of the dead man's

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clothes. The appellant said that he had committed the crime because he had lost all his money in gambling.

The defence was insanity. I called no evidence; but the circumstances shewed that the appellant must have been suffering from transitory mania. He was a quiet and inoffensive man, and was admittedly a friend of the Milsteins. The statement of appellant to the police officer was not true; he had not lost his money by gambling. The degree of violence and the nature of the wounds inflicted on the bodies were only consistent with the murder having been committed in a sudden frenzy. None of the implements used have been traced to the appellant. This shews that there was no premeditation. The judge summed up without putting this point properly before the jury. Where the facts bore an alternative interpretation favourable to the defence, he did not put both interpretations to the jury, as he ought to have done: *Vassileva*, 6 Cr. App. R. 228 (1911). The judge commented on the fact that the prisoner did not go into the witness box, as if the defence were not insanity at all.

Secondly, the evidence of Dr. Dyer, the prison doctor, to the effect that appellant was sane, was wrongly admitted. A copy of his report had been shewn to me, but I did not read the whole of it, but only his conclusions. He was called after the case for the prosecution was closed, with the consent of the judge, when it was ascertained that no witnesses, expert or other, were to be called for the defence on the question of insanity. This is contrary to the proper practice. I ask for a ruling on this point.

[AVORY J.: The rule in such cases has been definitely laid down by this Court in *Oliver Smith*, 6 Cr. App. R. 19 (1910).]

In that case, the point I am making seems not to have been determined.

One witness for the prosecution said at the police court that the appellant was known as "Myer the insane." Subsequently he retracted this statement. The prosecution ought to have told me of this. I was relying on the statement as it appeared upon the deposition, and consequently I was taken by surprise. I have five witnesses who can prove that the appellant was known as "mad Myer," and I now ask leave to call them.

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Bodkin and *Graham Campbell,* for the Crown, were not called upon.

CHANNELL J.: In this case it is suggested that there was something wrong in calling Dr. Dyer as a witness for the prosecution on the question of insanity at the time and in the manner in which he was called. In cases where there may possibly be a suggestion that the prisoner was insane, it is usual to consult a medical officer, and to get a report from him about the prisoner's state of mind. If the report says that the prisoner is, or is probably, insane, it may be useful evidence for the defence, and the practice is to hand a copy of the report to the defending counsel so that he may use it if he chooses to do so. If the report is adverse, and says that there is no reason to suppose that the prisoner is insane, it is of no use to the defence. It is not likely to be refused, if asked for, but there is no obligation to give it, and assuming it became necessary in the course of the trial to make it evidence, it is no objection to its admissibility that a copy of the report had not been given to the defence.

In this case it was clearly indicated by the cross-examination that the defence would be insanity. Before Dr. Dyer was called it was ascertained that no evidence was intended to be called for the defence, otherwise the evidence of Dr. Dyer would probably have been called in rebuttal. But as it was clear from the cross-examination that the defence was insanity, the evidence of Dr. Dyer was admissible and was properly called at the end of the case for the prosecution.

Another complaint is that the jury were not sufficiently directed by the judge that they might infer insanity from the fact that the murder was unpremeditated, and may have been done in a sudden frenzy. It is not necessary for the judge to repeat all the arguments of counsel in his summing up. Here the argument was open to considerable criticism. It is for the defence to prove insanity. That may sometimes be done by proving absence of motive, but it has been well said that absence of proved motive is a very different thing from proved absence of motive. Here it cannot even be said that there is no evidence of motive. The appellant himself stated that he had done it because he had lost all his money in gambling. In the circumstances of the case, that statement suggests that the motive was either robbery or

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revenge. The difficulty that sometimes arises of an unexplained murder does not arise in this case. There was really no evidence on which a reasonable jury could have found that the appellant was insane, and therefore it is quite impossible to say that the verdict was unreasonable, or that there has been a miscarriage of justice.

It is said that there are several witnesses who can say that the appellant was known as "mad Myer." We refuse leave to call them, because no real weight ought to be attached to that fact, if it were proved. The possession of such a nickname would not go far to shew that the appellant was not in such a state of mind as to have a judgment of right and wrong It would rather tend to shew that he was just the sort of man to commit a murder upon slight provocation, and to be quite responsible for his crime in law. No evidence was given or is now tendered of any kind of insane act done by him before the murder. We consider that there are no grounds for interfering with the verdict, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for the Appellant—*Jonas de Meza.*

A. L. B. T.

WILLIAM STANLEY.

Severity of sentence.

This was an appeal against sentence by leave of Ridley J. Appellant was convicted at the Croydon Borough Quarter Sessions on 9th January, 1912, of larceny, and was sentenced to eighteen months' imprisonment with hard labour.

Appellant was not present, and was not represented by counsel.

B. O. Bircham for the Crown: The appellant and another man, Lewis, were jointly charged with stealing four mackintosh coats, a cap, and a jacket from a show-case which was standing outside a shop and was locked with three padlocks. Lewis was

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sentenced to nine months' imprisonment with hard labour. He had never been convicted of larceny before, though he had been convicted of living on immoral earnings. The appellant was a man of brains, or at any rate a man with a good education, and was considered by the Recorder to have been the moving spirit. He had been tried for similar offences in the same Court twice before, and the jury had acquitted him each time. The Recorder had had an opportunity of judging his intelligence and education on those occasions. The Recorder stated that he did not regard those occasions as shewing previous guilt, but as indicating who was the moving spirit in the present crime. I am not instructed to argue in support of any particular sentence.

HAMILTON J.: This is the appellant's first offence, or at any rate this is the first time that he has been convicted. There was some evidence of his having associated at one time not only with Lewis, but with another convicted person. The Recorder seems to have rightly come to the conclusion that the appellant was at least as guilty as Lewis, but he has given him much the heavier sentence. We are of opinion that justice will be done by reducing the sentence to the same as that passed upon the other prisoner. The sentence is reduced to nine months.

Sentence reduced.

A. L. B. T.

HADIJAH AHMED CAROUBI.

The mere fact that a crime is committed by means of a preconcerted scheme between husband and wife does not rebut the presumption that she is acting under his coercion (especially if he is present while she carries out her part in the plan).

This was an appeal against sentence by leave of Bankes J., and an application for leave to appeal against conviction. Appellant was convicted (with others, including her husband, whose appeal is reported below, p. 153) at the Liverpool City Sessions on 6th October, 1911, of larceny, and was sentenced to three years'

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penal servitude and recommended for expulsion. The full facts appear in the judgment.

Valetta for the appellant, who was present. The appellant is the wife of Hadji Ben Ahmed Caroubi, and was charged jointly with him for stealing £2 15*s*. in money from a shop. According to the theory of the prosecution, the theft was actually done by the appellant, but it was done in the presence of her husband, and upon a signal given by him according to a preconcerted scheme. Mr. Riley, who appeared for the appellant at the trial, submitted to the Recorder at the close of the case for the prosecution that there was no evidence proper to go to the jury of any voluntary or independent act on the part of the appellant sufficient to rebut the presumption that she was acting under the coercion of her husband. He cited *Knight*, 1 C. & P. 116 (1823). The Recorder ruled that *Knight* had not been law for many years, and left the case to the jury. In this he was wrong. *Knight* has never been overruled, and is still good law. There was no evidence to rebut the presumption of coercion, and the case should have been withdrawn from the jury.

Even if the Recorder were right in leaving the case to the jury, he misdirected them on the question of coercion. He said in his summing up, referring to *Knight*, "There is the ancient case which Mr. Riley quoted which seemed to throw some doubt whether in more ancient days, when a woman was regarded as far more a chattel of her husband than she was since the Married Women's Property Act, she was considered to be free from guilt although she agreed with her husband to do the thing. I am bound to instruct you that is not the law to-day." Later on he says, "They seem to have acted in some collusion. If that is so you would probably come to the conclusion that there is a good deal in that to negative the presumption." The "collusion" may have been a direction by the husband to carry out his scheme If that were so, it would be positive evidence of coercion. and there would be no need to rely on the presumption. Anyhow, a pre-arranged scheme is not only not evidence of the independence of the wife, but rather of the contrary ; nor is the fact that the theft was carried out by the wife. That is the very act as to which the law presumes coercion ; it does not shew independent volition.

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[CHANNELL J.: The whole point is—what is sufficient evidence of acting voluntarily ?]

A. S. Comyns Carr for the Crown: These points are not raised by the appellant in her notice of appeal. The presumption does not arise from the mere fact that the parties are married ; the husband must be present. In *Knight,* the note which is the principal part of the report is inconsistent with *Brown* v. *Attorney-General of New Zealand,* (1898) A. C. 234; 77 L. T. 414, with *Baines,* 69 L. J. Q. B. 681; 82 L. T. 724; 64 J. P. 408; 19 Cox C. C. 524; C. C. R. (1900), and with *Torpey,* 12 Cox C. C. 45 (1871). The law is correctly stated in *Cohen,* 11 Cox C. C. 99; 18 L. T. 489; 16 W. R. 941; C. C. R. (1868). The preconcerted arrangement was not evidence either in favour of coercion or against it, and did not in any way preclude the jury from finding on other evidence that the appellant acted independently. The other evidence was the conduct of the appellant in the shop where all the active steps were taken by her, and not by her husband. There never can be direct evidence of the independence of the will ; it must be inferred from conduct. The jury were entitled to find the appellant guilty upon the evidence before them.

HAMILTON J.: This is an application for leave to appeal against conviction, and is treated as a final appeal. The appellant was defended by counsel, and the substantial defence was that she was the wife of the other prisoner charged with the same offence, and was entitled to the benefit of the presumption that she acted under the coercion of her husband. The prisoners are Arabs—and presumably Moslems—but as counsel for the Crown raises no question upon it, we need not consider how far this presumption applies in the case of persons who are permitted to be polygamous by the law of their religion or their domicile. We start with the uncontradicted evidence of the police constable that they are, or are reputed to be, husband and wife.

They were jointly indicted for larceny. No eye saw the theft committed, but the facts upon which the jury found them guilty were as follows. They came into a shop together and pretended to speak very imperfect English, but they made it plain that they wished to buy something. The man entered into conversation

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with the assistant about matching some material which he produced. Upon this attempt to do business proving unsuccessful, the woman produced a sovereign and intimated that she wanted change for it. The assistant took her to the cashier's box; this was an enclosure in the middle of the shop somewhat like a witness box. Three of its sides were of such a height that a man of ordinary size could see over them by standing on tip-toe. The appellant and the cashier discussed the changing of the money, and the cashier put down twenty shillings in silver on the desk. The woman made him understand that she wanted two half sovereigns instead. The cashier took a handful of coins out of his drawer to look for them; the woman put her hand near the money, and the cashier made as if to prevent her from taking them, whereupon she cried out something unintelligible to him. Then the husband, who had been occupied elsewhere, made his appearance at the other side of the cashier's box, and made a noise which distracted the cashier's attention. The cashier stood on tip-toe and looked towards him. Shortly afterwards the woman, having been given her change, obligingly put the silver back into the drawer and then left the shop with her husband. On thinking over the incident the cashier decided to count his money, and discovered that he was £2 15*s.* short. Since the previous counting no money had been paid in or out, and then he suspected that the woman had stolen the missing money while his attention was distracted by the husband.

What the woman did was done in the presence of her husband. He could have seen her, and she him, at any time during the transaction, and therefore they were in the presence of one another. This raises the presumption, according to the rule of law, that the woman acted under the coercion of her husband, but it is a presumption, and is not conclusive. The law is correctly laid down in a passage cited from 1 Hale, 516, in Archbold's Criminal Pleading, 24th ed., p. 19: "If it appears that the wife was principally instrumental in the commission of a crime, acting voluntarily, and not by constraint of her husband, although he was present and concurred, she will be guilty and liable to punishment." It was, accordingly, necessary to direct the jury carefully what evidence was sufficient to rebut the presumption, and it should have been explained to them what amounted to acting voluntarily, and to what extent her conduct must

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be independent before she could be treated as a guilty person. The Recorder seems to have formed some misconception as to the effect of a preconcerted arrangement between husband and wife. He failed to appreciate that the very fact of such an arrangement might be evidence, and perhaps strong evidence, that the husband had been coercing his wife. He seems to have thought that if there was such an arrangement, which he calls "collusion," that was enough by itself to rebut the presumption of coercion, and he proceeded to direct the jury as follows: "You must look at the independent part the woman takes in the transaction, and the general nature of the transaction, if you have any doubt in your mind that she acted under coercion at all. I am bound to point out in this case that there is nothing at all which supports the view that she acted under the coercion of her husband. If they acted at all guiltily they seem to have acted in some collusion. If that is so, you would probably come to the conclusion that there was a good deal in that to negative the presumption and entitle you to find both guilty." The fact that this is not a lucid explanation makes it probable that the jury were not able to apply their minds to the question which they had to consider. The defence was not left to the jury in a way in which they could do it justice, and we are therefore of opinion that the conviction must be quashed. The appellant, however, will be tried on another indictment.

Conviction quashed.

Solicitors for the Appellant—*Ellis, Leathley & Willes.*

A. L. B. T.

HADJI BEN AHMED CAROUBI.

Severity of sentence.

This was an appeal against sentence by leave of Ridley J., and an application for leave to appeal against conviction. Appellant was convicted (with his wife, Hassan Ben Hadji, and Fatma Hadji) at the Liverpool City Sessions on October 6th, 1911, of

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larceny, and was sentenced to three years' penal servitude and recommended for expulsion. Kervorkian (above, p. 96) was included in the same indictment but was tried separately.

Valetta, for the appellant, who was present. The facts in this case are the same as in *Hadijah Ahmed Caroubi* (above, p. 149), and they have just been stated by Hamilton J. in his judgment in that case, which had reference to the wife of the present appellant. There were a number of remarks in the summing up of the Recorder which must have prevented the appellant from having a fair trial. After saying that palming was not difficult to do, he added, referring to the two prisoners: "They are probably not doing it for the first time"; he also said: "They do not only seem to have had a knowledge of the justice of their own country." This implied that they had been charged with offences in several countries, whereas there was no evidence of any charges having been made against them in any country. Dealing with the fact that the appellant was not in want of money, but possessed valuable jewellery and antiques and a good deal of cash, the Recorder said: "There are some people in this world who make a business of going round to shops and playing tricks, here upon drapers and there upon jewellers, and so make a living."

The sentence was too severe. This was a first offence, and penal servitude is not usually inflicted in such a case: *Kervorkian* (above, p. 96). The police stated that Fatma Hadji, a woman who had been convicted more than once, was the daughter of the appellant, and the Recorder seems to have punished him either for having trained his child to crime, or for having such a child at all. Both the appellant and his wife strenuously deny that Fatma, who is a married woman, is the daughter of either of them. The evidence given by the police as to character after verdict was not interpreted to the appellant, who therefore had no opportunity of cross-examining or contradicting them.

A. S. Comyns Carr, for the Crown. The appellant denied that he was acquainted with Hassan Ben Hadji and Kervorkian at all, but there is evidence that this is not true. He also said that he only spoke Arabic, but there is evidence that he speaks other languages.

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HAMILTON J.: In this case the Court sees no grounds whatever for granting leave to appeal against the conviction. The appellant also appeals against his sentence of three years' penal servitude. The police gave him the worst of characters, and they may have had good grounds for doing so, but it was his first conviction. In passing sentence upon the appellant the Recorder seems to have given undue effect to the previous conviction of another person. Without in any way laying down a rule, we think that the sentence should be reduced to eighteen months' imprisonment with hard labour, as in Kervorkian's case. The recommendation for expulsion is not interfered with.

Sentence reduced.

Solicitors for the Appellant—*Ellis, Leathley & Willes.*

A. L. B. T.

[IN THE HOUSE OF LORDS.]

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LEACH ..... *Appellant*

and

THE DIRECTOR OF PUBLIC PROSECUTIONS (on behalf of His Majesty) ..... *Respondent.*

Coram: The Lord Chancellor, the Earl of Halsbury, Lord Macnaghten, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Robson.

The true construction of sub-s. 1 *of s.* 4 *of* 61 & 62 *Vict. c.* 36 (*The Criminal Evidence Act*, 1898), *is that the husband or wife of the defendant cannot, in the cases governed by the sub-section, be compelled to give evidence against his or her will.*

Decision of the Court of Criminal Appeal in Leach (7 *Cr. App. R.* 84; 1911) *reversed.*

Appeal from an Order of the Court of Criminal Appeal (*a*).

V. G. Milward for the appellant. This is an appeal from the Court of Criminal Appeal and from the conviction. The appellant was convicted on the 24th November, 1911, at the Stafford Assizes, for an offence under the Incest Act, 1908, and sentenced to three years' penal servitude. From that conviction he appealed, and the appeal was heard on the 19th December, and was dismissed. There are no facts which it is necessary to bring before the House, but the appeal arises in this way. At the hearing before the justices the appellant's wife was called to give evidence against him; she raised an objection, but it was overruled. At the assizes, at which she was bound over to appear, she again protested that she was unwilling to give evidence; the matter was argued, and the judge held that she was a compellable witness. The ques-

(*a*) The appeal is reported above, p. 84.

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tion raised by this appeal is whether the wife was a compellable, or merely a competent, witness.

The Incest Act is placed by s. 4 (4) in the schedule to the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), and sect. 4 (1) of that Act governs the procedure under the Incest Act. That subsection is as follows:—"The wife or husband of a person charged with an offence under any enactment mentioned in the schedule of this Act may be called as a witness either for the prosecution or defence, and without the consent of the person charged." The question is whether the words "may be called as a witness" mean that the wife is a competent witness only, as the defence say, or a compellable witness, as the prosecution say. It is necessary first to see what the common law on the subject was. This is excellently put in Mr. Justice Lush's "The Law of Husband and Wife," at p. 3 (3rd ed.):—"From the earliest times it has been laid down as a fundamental principle of law, a principle upon which the whole law relating to husband and wife has hitherto depended, that by virtue of the marriage a husband and wife become one person in law." See *Firebrass* d. *Symes* v. *Pennant*, 2 Wils. K. B. 254 (1764). That is the basis of my whole argument. It followed from that maxim that neither husband nor wife could be a witness against the other as it was impossible to divide the unity. See *R.* v. *Inhabitants of Cliviger*, 2 T. R. 263 (1788); *O'Connor* v. *Marjoribanks*, 5 Scott (N. R.) 394; 4 Man. & G. 435; 12 L. J. C. P. 161; 7 Jur. 834 (1842); and *Phillips* v. *Barnett*, 1 Q. B. D. 436; 45 L. J. Q. B. 277; 34 L. T. 177; 24 W. R. 345 (1876), where Field J. said:—"I think it clear that the real substantial ground why the wife cannot sue her husband is not merely any trouble about procedure, but the general principle of the common law that husband and wife are one person." To that rule there were three common law exceptions, namely, in cases of high treason, personal injuries by one to the other, and forcible abduction followed by marriage; those are common law exceptions, see *R.* v. *The Lord Mayor of London*, 16 Q. B. D. 772; 55 L. J. M. C. 118; 54 L. T. 761; 34 W. R. 544; 16 Cox C. C. 81; 50 J. P. 614 (1886), where it was held that a wife could not prosecute her husband for libel. The unity may be broken at the will of either party where the wife is made a competent witness, and may be absolutely broken by statute when the wife is made a compellable witness. Unless

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there is a clear direction by statute to this effect the common law remains good. The first statute which dealt with the subject was Lord Brougham's second Evidence Act, 1851 (14 & 15 Vict. c. 99), which by s. 2 made parties to any civil action "competent and compellable" witnesses, and by s. 3 preserved the existing state of the common law as regards criminal proceedings. That section is still unrepealed, and puts into statutory form the common law that a wife is neither a competent nor compellable witness against her husband in criminal proceedings. That section (3) was re-enacted by the Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), s. 2. Under the Criminal Evidence Act, 1898, the husband, if defendant, is competent to give evidence for the defence, and, so far as that goes, the wife would also be competent, because the two parts of the unity must proceed on parallel lines. But the prisoner is not a compellable witness, and, therefore, unless there is statutory authority to the contrary, owing to the unity, the wife is competent as the husband is competent, but the wife is not compellable since the husband is not compellable.

Between the Evidence Act, 1851, and the Criminal Evidence Act, 1898, there were twenty-five or twenty-six statutes passed, which are set out in Russell on Crimes, 7th ed., at p. 2272, permitting the calling of the defendant and spouse, and in practically every instance, if the wife is mentioned at all, a distinction is made; she is either called competent, or competent but not compellable. The only statute under which the wife is made a compellable witness either for the prosecution or the defence is the Married Women's Property Act, 1884 (47 & 48 Vict. c. 14); under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), by ss. 12 and 16, spouses were made "competent" witnesses "against each other" in criminal proceedings with respect to property. (Counsel read ss. 12 and 16 of the Act.) The Act of 1884 (47 Vict. c. 14, removing doubts as to ss. 12 and 16 of the Married Women's Property Act of 1882) is, it seems, the only statute which breaks the unity, and entirely separates husband and wife, and makes them two separate persons; for by s. 1, in criminal proceedings against a husband or wife authorised by the Act of 1882, "the husband and wife respectively shall be competent and admissible witnesses, and except when defendant, compellable to give evidence." This is the only

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enactment which makes either a husband or a wife a compellable witness for the prosecution against each other. Before coming to the Act of 1898, the main point is that, they being one, so long as the husband remains uncompellable, the wife must, too (except for express words of a statute). (I should also mention that under the Evidence Act, 1877, s. 1, in certain civil proceedings for non-repair of a highway, the husband or wife may be made compellable witnesses.)

Now it was the word "competent" which it was necessary to construe, and I submit that the words "may be called as a witness" in the Criminal Evidence Act, 1898, mean competent, and nothing else. S. 1 of that Act (*b*) deals entirely with witnesses for the defence, but the unity of husband and wife is still recognised, for the consent—"the application"—of one spouse charged with a crime is required before the other can be called as a witness (s. 1c), and if either does not give evidence, the prosecution may not comment on it any more than they may on a failure of the prisoner to give evidence (s. 1*b*); so the wife is not treated as an ordinary witness, as it is the contention of the Crown she should be under this Act.

Then comes s. 4, the words of which must be read in sequence with the common law and the Acts already passed. "(1) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness for the prosecution or defence, and without the consent of the person charged. (2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person." This section only deals with the consent of the prisoner, not of the witness; the expression "may be called" is, so far as I know, not to be found in any other Act; the words used in 58 & 59 Vict. c. 24 (Law of Distress Amendment Act, 1895), s. 5, are: "The wife of such person [defendant] may be required to attend to give evidence as an ordinary witness in the case, and shall be competent, but not compellable, to give evidence." The same words are used in

(*b*) S. 1 (c) is: "The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged."

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58 & 59 Vict. c. 28 (False Alarms of Fire Act, 1895), s. 2, and in 60 & 61 Vict. c. 60 (Chaff-cutting Machine (Accidents) Act, 1897), s. 5, the words are "competent but not compellable witnesses." Thus, even in the most recent statutes, a distinction has always been drawn between "competent," which, in my submission, is equivalent to "may be called," and "compellable," which means "must give evidence."

In the six Acts mentioned in the schedule to the Criminal Evidence Act, 1898, the words on this point vary, but it is possible to shew that an addition is made to each of them by giving the interpretation I suggest to the words "may be called as a witness," viz., that the wife is merely competent. They will all be satisfied by treating s. 4 in this way. If it meant "compellable," it would be going much further in each of these Acts. Then it is difficult to see why the Married Women's Property Act, 1882, is included in the schedule if the object of the section was to make the wife compellable, for that had already been done (and *only* done) by the amending Act of 1884; my suggestion is that the Act is included in the schedule to make it clear that the husband or wife can under the Act of 1884 be called without the consent of the person charged (words which do not occur in that Act). Further, the words "without the consent of the person charged" seem inappropriate—even absurd—if the wife is to be a compellable witness, though they are appropriate enough if she is merely competent. Where there is a right of such long standing existing under the common law, and one of such importance as between husband and wife, it should not be taken away except by the clearest words of a statute.

Finally, if a reluctant wife is to be forced into the witness box, it is obvious that the result will inevitably be a great increase of perjury. A change of such magnitude should be effected by clear and definite words, and not by the interpretation of a vague and ambiguous phrase. [Counsel then read the judgment delivered in the Court of Criminal Appeal.]

As to the Acts before the Act of 1898, which say that the wife is competent, but not compellable, it might be possible to read into them that the husband could object. The question of a prisoner objecting to his wife giving evidence was not likely to arise before, as she could only, I suggest, do so for the defence; but if it did arise, as the unity remained, I suggest he had the

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power to object; as she was not compellable and could object, he could also. The only exception was under the Married Women's Property Act, 1884, under which alone the wife could be called for the prosecution, and there the husband could not object because the unity was severed. S. 1c of the Act of 1898 thus re-enacts the existing law regarding a wife called as a witness for the defence. It is hardly likely that if for years the wife could give evidence against the wish of the prisoner, they would enact s. 1c; probably it is a re-enactment of the existing common law or an interpretation of the statutes on the subject. Thus, s. 1 refers solely to the defence, and s. 4 to the prosecution, though it is not easy to see what value the words "or defence" have in s. 4.

Sir John Simon, S.-G. (with him *S. A. T. Rowlatt* and *T. M. Snagge*), for the Crown. This case has been certified as a matter of general importance by the Attorney-General, and the duty of the Crown is only to take a side for the purpose of shewing the arguments in favour of the view taken by the Court of Criminal Appeal, a view which, it is submitted, is the right one.

There are, as the argument has shown, three conceivable points of dispute when it is suggested that a wife should go into the witness box against her husband in the dock. First, is her evidence admissible at all? which is properly expressed by saying, Is she competent? and I agree with Mr. Milward's view of the common law position. Secondly, if her evidence is admissible, can she refuse to give it? in other words, Is she compellable? Thirdly, if the wife's evidence is admissible, and she is not entitled to refuse to give it, can the husband in the dock veto it? That is not properly expressed by saying, Is her evidence compellable? A third word is required. As regards the twenty-six or twenty-seven statutes which are set out on p. 2272 in Russell on Crimes, the common law was so far abrogated that a wife became a competent witness against her husband in criminal proceedings, though the terms on which her evidence was accepted were not always the same. The Act of 1898 did not legislate with reference to all of these statutes, but it picked out four of them, and added two others under which the wife until then could not give evidence at all, and it is with reference to these six only that s. 4 is enacted. In

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considering the section it is necessary to consider not merely what has been taken, but also what has been left. The schedule is referred to, not for the purpose of any law of evidence, but for the purpose of making a list of offences to which the section is to apply It is necessary to consider what the six cases are; first, there are the Vagrancy Act, 1824, and the Poor Law (Scotland) Act, 1845), under both of which before 1898 a wife could not give evidence either against or for her husband: these two are brought into the category for the first time. The remaining four are picked out of those statutes under which the wife was a competent, but not (except under the Married Women's Property Act) a compellable, witness, thus deliberately leaving the law unaltered as to the remainder, some twenty or more. The six cases picked out are those where it is plainly desirable as a matter of common sense, that a wife should give evidence, and ought not to be put in a position where her husband could ask whether she wished to do so. I agree that before 1898, with a single exception, the statutes that made her competent said in one form or another, not compellable. The scheduled offences are selected out of a long list for the operation of s. 4, the rest of which the Legislature does not touch. If the proper interpretation of the section is that which my learned friend contends for—not to make the wife a compellable witness, there is no reason why the other twenty or more Acts, say, the Libel Act, 1888, under which (by s. 9) the wife was already competent but not compellable, should not have been included in the schedule. Now, my suggestion is, that the six included were put in by way of contrast. [The learned Solicitor-General went through them briefly.] It must be that the Legislature came to the conclusion that the wife in certain cases was to be compellable. The Married Women's Property Act, 1882, is included in the schedule, and not the Married Women's Property Act, 1884, because it is a schedule of offences, and it is the Act of 1882 which created the offence. It was doubtful whether under that Act the wife was to be compellable or not, so the Act of 1884 was passed, which made it clear that the meaning of the Act of 1882 was that she was compellable except when she was a defendant. It is true that taking these two statutes together, s. 4 of the Act of 1898 does not appear to have altered the position, but the Act of 1882 is properly included

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if the schedule is setting out a complete list of the cases in which a wife was a compellable witness for the prosecution against her husband. If the contention urged on behalf of the appellant is correct, the section as regards the four last statutes in the schedule is mere surplusage. Moreover, there is no reason why these four should have been picked out of the various statutes under which the wife was a competent witness, when the result is that those which are picked out are in the same position as those which are left. As to the Married Women's Property Act, the schedule is meant to be a list of all cases in which the wife is to be competent and compellable it was right to include the one case in which case she was already so; it may be surplusage, but it is useful and appropriate.

[LORD ATKINSON: Are there any cases under those Acts making the wife a competent witness where the husband has objected?]

The husband has no veto under any of those Acts; if he had, he would always use it, and so would prevent the prosecution proving its case.

It seems a difficult proposition to maintain, apart from express enactment, that the question whether a witness should give evidence or not should depend on that witness. The interests to be served are either those of justice or of innocence, neither of which are served by leaving an option to the witness to give evidence or not.

[The LORD CHANCELLOR: There may be something more than justice and innocence at stake. It might be thought better that a guilty person should escape, than that homes should be made impossible by husband and wife being compelled to divulge things against one another.]

The offence in this case is under the Punishment of Incest Act, 1908 (8 Ed. 7, c. 45). Sect. 1 of the Act defines the offence, and s. 4 (4) provides "Section 4 of the Criminal Evidence Act, 1898, shall have effect as if this Act were included in the schedule to that Act"—another instance of legislation by reference.

The expressions "competent" and "compellable" are first in-

troduced in Lord Brougham's Act, which excluded criminal proceedings, but the language used in the later Acts is very variable —"shall be competent," "may if he thinks fit be sworn and examined as an ordinary witness," "may if he thinks fit tender himself and his wife to be examined on his behalf," and "may be called." The draughtsman of the Act of 1898 rightly avoided using the word "compellable."

[The LORD CHANCELLOR: Before 1898 there were certain persons who, under certain statutes, were not compellable to give evidence. The section says the wife may be called, although some one else does not consent. How is that equivalent to saying she may be called although she herself does not consent? That is the point.]

I do not suggest that "without the consent of her husband" has the same meaning as "without her own consent," but *primâ facie* a witness cannot refuse to give evidence, and therefore if a wife may be called there is no inference that she can refuse to give evidence. The only way of giving effect to s. 4 is to hold the wife compellable. Otherwise a witness under the Prevention of Cruelty to Children Act, 1894—scheduled—is in exactly the same position as one under the Libel Act of 1888—unscheduled.

[LORD ROBSON: It is building a good deal on inferences to be drawn from the inclusion of particular Acts in a schedule. But there is a broader point. Would any Legislature suppose that so fundamental a change in the English criminal law—as compelling a wife to give evidence against her husband—was being made by the words which are to be found in this section, or by an item in a schedule to an Act?]

There is no principle of English criminal law that a wife, when competent, is not compellable; the common law principle is that all competent witnesses are compellable.

Read in the light of what the rest of the Act says, the words bear the meaning contended for. The Act is primarily designed to deal only with evidence for the defence; s. 1 deals with that alone, and the word "competent" is aptly used in that section, but not in s. 4. I submit that *primâ facie* "competent" means

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that, like anyone else legitimately summoned, she must give evidence. In the absence of other words, "competent" does not justify the inference that the witness is not compellable.

[The EARL OF HALSBURY: I should have thought that if the known state of the law was that in order to confer competency you had to enact it, the fact that you simply used the word "competent" did not necessarily mean "against his or her will."]

It is submitted that under s. 1, if his wife is called by the prisoner, she cannot refuse to give evidence; like every other witness who is legitimately summoned to give evidence, when summoned, she must give it; in other words, she is compellable at the instance of her husband. Why should she be treated unlike all other witnesses?

[LORD ATKINSON: Because she is unlike all other witnesses, inasmuch as she is the prisoner's wife. You would certainly expect a distinct enactment excluding the application of the common law principle.]

[The EARL OF HALSBURY: You certainly have no specific statutable enactment enabling the wife to give evidence against her husband.]

At common law the wife was a competent witness where personal injuries to herself were involved, but in such cases she was also at common law a compellable witness; the effect of making her a competent witness by statute must be the same.

[LORD SHAW: Would not the implication from s: 1 (d)—non-compellability in one case—be that the wife is compellable except in that one case?]

I submit that it would.

The last statute in the schedule is the Prevention of Cruelty to Children Act, 1894. That Act was repealed by the Prevention of Cruelty to Children Act, 1904, which contains in s. 12 the following provision: "In any proceeding against any person for an offence under this Act, or for any of the offences mentioned

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in the first schedule to this Act, such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case and shall be competent, but not compellable, to give evidence." Why, if under the Act of 1898 the wife was a competent, but not a compellable, witness, was it necessary to say it over again? Then the Act of 1904 has in its turn been repealed, and in the consolidating Act, the Children Act, 1908, s. 27 provides: "As respect proceedings against any person for an offence under this part of this Act, or for any of the offences mentioned in the first schedule to this Act, the Criminal Evidence Act, 1898, shall apply as if in the schedule to that Act a reference to this part of this Act and to the first schedule to this Act were substituted for the reference to the Prevention of Cruelty to Children Act, 1894."

As to the policy of compelling wives to testify against their husbands, if the wife is held not to be a compellable witness many of the offences committed by fathers on young children will never be proved; the evidence of the child in such cases is corroborated by the mother giving evidence of a complaint by the child. The wife's position is rendered intolerable if she is only required to testify because she chooses to do so. Generally, the expression used in various statutes is not "competent and compellable," but "competent but not compellable"—call it "voluntary"; therefore the use of the word "competent" alone must lead to the inference that the witness is also compellable, because it does not say she is voluntary. It might have been clearer to have used the word "compellable" in s. 4, but the difficulty is that the section deals not only with the wife or husband, but with the prisoner, to whom the word "compellable" is clearly not applicable.

[The LORD CHANCELLOR: There are various statutes, *e.g.* the Conspiracy and Protection of Property Act, 1875, s. 11, which provide merely that the wife or husband shall be a competent witness. Has there been any decision as to whether in those circumstances they are compellable witnesses?]

I cannot refer to any such case.

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Rowlatt. The Criminal Evidence Act, 1898, intended to put this question on a general basis, to make a new starting point, and to deal with the subject in a comprehensive way. At common law the wife was merely incompetent, the question of compellability could not arise; but once you get rid of incompetence, compellability follows. If a man attempted to murder his wife, she would be compelled to go into the box for the Crown. There is no substantive rule of common law that a wife is not compellable to give evidence against her husband. This Act is dealing only with the questions of competency and the right of election by the prisoner in certain cases; the question of compellability is, I suggest, studiously excluded. S. 1 only deals with the defence. It is unfortunate that in s. 4, which deals with two different things, so much has been tried to be enacted in a few lines. First, the words "may be called" are a permission to the prosecution to call that witness, with the legal result that the witness must answer the writ of *subpœna* when it is addressed to her. Next come the words "or defence," and as it is intended to make an exception in these cases to the rule (s. 1, sub-s. *c*) that the consent of the prisoner is required, the words "and without the consent of the prisoner" are brought in. The word "and" is awkward, in fact, bad grammar, for the consent of the prisoner cannot be in question where a witness for the prosecution is concerned. Incest was a crime not known to the criminal law before 1908, so there is no history of compellability or non-compellability in the matter. You have simply an enactment that the spouse of a person charged with incest may be called for the Crown.

[The LORD CHANCELLOR: Were there any cases in which the consent of the person charged was needed for any one to be a witness for the prosecution?]

I do not know of any.

Milward, in reply (which he was asked by the House to confine to one point). In the case of an ordinary person if he may be called as a witness, the usual consequences follow, *i.e.*, he must give evidence, but the wife has never, as regards her husband, been in the position of an ordinary witness by reason of the common law, and she can no more be compelled than the prisoner himself can be compelled.

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The LORD CHANCELLOR (*c*): My Lords, I do not pretend to conjecture whether the decision which your Lordships, I think, will arrive at is *pro bono publico* or not, because, on the one hand, it is very desirable that in a certain class of cases justice should not be thwarted by the absence of the necessary evidence, but upon the other side it is a fundamental and old principle to which the law has looked, that you ought not to compel a wife to give evidence against her husband, especially in matters of a criminal kind. Fortunately, it is not our duty to-day to consider these consequences at all. What we have to consider is, what is the meaning of the law that has been laid down in the Act of 1898?

My Lords, this appellant was indicted and was convicted for an offence under the Incest Act. In the course of that trial his wife was called and asked to give evidence; she objected to give evidence for the prosecution, but was directed to do so and compelled to do so. The question is whether this was lawful or not. It is clear that this question must be governed by s. 4 of the Criminal Evidence Act of 1898, which runs as follows: "The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence, and without the consent of the person charged."

Now, my Lords, if it had not been for that s. 4 the wife could not have been allowed to give evidence, and the result of that was that the wife could not have been compelled to do so, and was protected against compulsion. The difference between leave to give evidence and compulsion to give evidence is recognised in a series of Acts of Parliament. Does, then, s. 4 which I have read deprive the wife of this protection? It is capable of being construed in different ways, and it may hereafter lead, for all I know, to various other difficulties, but the present question is, does it deprive this woman of this protection? My Lords, it says in effect that the wife can be allowed to give evidence even if her husband objects. It does not say she must give evidence against her own will. It seems to me that we must have a definite change of the law in this respect definitely stated

(*c*) The judgments are printed from a transcript of a shorthand report, supplied by the courtesy of the Director of Public Prosecutions.

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in an Act of Parliament, before the right of this woman can be affected, and therefore I consider that this appeal ought to be allowed, with what consequences or how that may be conformable to what is in the true interests of society or the public, I am sorry to say in this particular case we are not concerned and have no liberty to enquire.

EARL OF HALSBURY: My Lords, I am entirely of the same opinion. I confess I do not think the matter was one upon which I should myself have entertained very much doubt in the first instance. One must consider, when you are dealing with Acts of Parliament and considering what the effect of your supposed construction is, whether or not you are dealing with something that is possible the Legislature might either have passed by definite and specific enactment, or have allowed to pass by some ambiguous inference.

Now, dealing with that question, I should have thought that it is one of the things that would occur not only to a lawyer, but that almost everybody in English life would recognise the fact that a wife ought not to be allowed to be called against her husband. It is not necessary to enter into that question; but what I mean is that those who are under the responsibility of passing Acts of Parliament would recognise a matter of that supreme importance as one to be dealt with specifically and definitely, and not to be left to an inference.

I think that observation is true also for this reason; that when you are dealing with a question of this sort you cannot leave out of sight the different Acts of Parliament that have been passed, in one sense, upon this subject, with a sort of nomenclature of their own; and I must say for myself, speaking as an ordinary person, I should have asked, when it was proposed to call the wife against the husband: "Will you shew me an Act of Parliament that definitely says you may do so? because since the foundations of the common law it has been recognised that this is contrary to the course of the law." And if no statute was capable of being produced, after the extremely able argument we have had on the part of the Crown—urged not a bit more earnestly than it was right it should be, for it is most proper that those who represent the law should have urged every argument that could be urged to shew what was the true construction of the statute—I say when

that is the condition of things with which we are dealing, I cannot doubt what the ordinary and natural course of events would have been. If you want to alter the law which has lasted for centuries and which is almost ingrained in the English Constitution, in the sense that everybody would say, "to call a wife against her husband is a thing that cannot be heard of"; to suggest that that is to be dealt with by inference and that you should introduce a new system of law without any specific enactment of it, seems to me to be perfectly monstrous.

The result is, that I entirely concur with what the Lord Chancellor has said and with nothing more than with what he urged, that such an alteration of the law as this ought to be by definite and certain language.

LORD ATKINSON: My Lords, I concur. I think the principle that a wife is not to be compelled to give evidence against her husband is deep-seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite and positive enactment, not by one so ambiguous as that relied upon in this case.

The other noble and learned Lords concurred.

Order of the Court of Criminal Appeal reversed: Cause remitted back to the Court of Criminal Appeal to do therein as shall be just and consistent with this judgment.

Lords' Journals, Feb. 26, 1912.

Solicitors for the Appellant—*Mills, Curry & Gaskell,* agents for *Johnson & Son,* Newcastle-under-Lyme.

A. L. B. T.

BEFORE

MR. JUSTICE CHANNELL, MR. JUSTICE HAMILTON, AND MR. JUSTICE LUSH.

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Application to enter a judgment of the House of Lords. The order of the House of Lords on February 26th reversing the order of the Court of Criminal Appeal in this case was sent to the Registrar of the Court by the Clerk of the Parliaments. On the 27th February, 1912, Channell J. admitted the prisoner to bail as an appellant under s. 1 (6) of the Criminal Appeal Act, binding him over in his own recognizances to appear, if called upon, at the next sitting of the Court of Criminal Appeal.

V. G. Milward for the appellant. My application is that the order of the House of Lords be received, the appeal allowed, and the conviction quashed.

T. M. Snagge, for the Crown, assented. The Court granted the application.

Conviction quashed.

Solicitors for the Appellant—*Mills, Curry & Gaskell*, agents for *Johnson & Son*, Newcastle-under-Lyme.

A. L. B. T.

BEFORE

MR. JUSTICE CHANNELL, MR. JUSTICE HAMILTON, AND MR. JUSTICE LUSH.

HENRY CRISP.

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If there is any ambiguity in the expression of a verdict, the judge is entitled to ask the jury to reconsider it, and if they do so their ultimate finding is to be recorded.

Severity of sentence—The Court does not view with favour the imposition of a sentence on a prisoner addicted to drink severer than is usually passed for the given offence, merely to promote habits of temperance on his part.

This was an appeal against conviction, by leave of Bankes J., and an application for leave to appeal against sentence. Appellant was convicted at the Bodmin Assizes on the 27th January, 1912, of an attempt to commit suicide, before Darling J., and was sentenced to six months' imprisonment.

E. Percival Clarke for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The prisoner had been a billiard marker at the Royal Hotel, Falmouth, but he gave way on several occasions to drink, and was dismissed for that reason on the 10th January in the evening, being then under the influence of drink. On the same evening he jumped off the quay into Falmouth Harbour, shouting, "A hundred to one," a remark which has never been explained. He was still under the influence of drink when taken out of the water, but was given some whiskey as a restorative. When arrested, he said, "I meant to destroy myself to-night, and will do so yet," and later, "I will do it to-night." He was seen by a doctor, who found him drunk and without any control over his actions; he was throwing himself about, fighting the police who were trying to get his clothes off, and using violent language. On the following day he said he would do it again. The state of the prisoner's mind was the

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sole issue in the case. He did not go into the box, but a written statement was read to the jury, in which he said it was all due to the curse of drink; he then made a statement from the dock, and said he never in his life intended to commit suicide. In his summing up the judge said, "If he had been drinking it does not matter, unless you come to the conclusion that he was so drunk he did not know what he was doing, and knew nothing at all." The jury returned a verdict of "Guilty, but of unconscious mind," on which the judge said, "You must not find that he is insane; there is no evidence of that," and the foreman answered, "We say he was of unconscious mind. You would not call that insane," and a juror added, "We say he is guilty, but unconscious of his act at the time." The judge then went through the evidence to shew that he was not unconscious of his act, and said, "You have got his own words that he did mean to drown himself," and the jury finally found the prisoner guilty.

I submit that the first verdict meant that the prisoner had substantiated his defence that he was so drunk at the time as not to know what he was doing, and it should have been accepted by the judge as an acquittal. This was made clear by the statements of the foreman and the other juror. The law on the subject is not quite correctly stated in Archbold's Criminal Pleading, 24th ed., p. 234, as follows: "A judge is not bound (unless the jury insist on having it recorded) to receive the first verdict which the jury give, but may direct them to reconsider it; and the verdict which the jury ultimately return is the verdict to be recorded."

[CHANNELL J.: These words need the qualification, "provided there is any ambiguity."]

That is so, and the cases quoted in support of the proposition, *Meany*, L. & C. 213; 32 L.J.M.C. 24; 8 Jur. (N.S.) 1161; 7 L.T. 393; 11 W.R. 41; 9 Cox C.C. 231 (1862); and *Yeadon*, L. & C. 81; 31 L.J.M.C. 70; 7 Jur. (N.S.) 1128; 5 L.T. 329; 10 W.R. 64; 9 Cox C.C. 91 (1861), were cases in which there was an obvious ambiguity. In the present case the verdict was free from ambiguity, and so should have been accepted; see *Gray*, 17 Cox C. C. 299 (1891). Too much importance should

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not be attached to the prisoner's statements, as they were made while he was still very drunk.

As to sentence, although the imprisonment is without hard labour, it is too severe for a man who has no previous conviction, regard being had to the nature of the defence and to the fact that he has been in prison since the 10th January.

W. T. Lawrance for the Crown. The first verdict was ambiguous and confusing; when it was returned the jury had not appreciated the true effect of the evidence given as to the prisoner's statements. The verdict ultimately recorded should prevail.

The sentence was passed by the judge to accustom the prisoner to doing without alcoholic drink, to which his downfall was entirely due.

CHANNELL J.: This case appears to us not really to raise the somewhat difficult question of criminal law which it comes near to raising. The jury seem to all of us to have given a verdict which shews that they somewhat misunderstood the summing up. The summing up was short and quite correct, but the judge did not put to the jury fully the evidence as to what the prisoner said when he was pulled out of the water, which is strong to shew that he knew what he was doing. Then the jury gave a verdict by which we think they intended to acquit the appellant; there was no real ambiguity; they must have intended to answer the question in favour of the appellant, though the verdict was put ambiguously. The jury might possibly have insisted on its being taken as a verdict of not guilty, but they did not do so, and they accepted the judge's invitation to consider their verdict further. They then had the evidence brought more fully to their attention, which shewed that their verdict was wrong, and they then returned the right verdict. In these circumstances it cannot be said that the first verdict ought to be recorded; the jury did not insist that it should be, so the case does not raise the question it would have raised had they done so; there is therefore no reason to interfere with the conviction.

As to the sentence, we think the judge did not give quite the right effect to the view which the jury took, nor to the fact that the appellant was drunk at the time. Even for the benevolent

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purpose of keeping him from drink it is a longer term than is usually given for this offence. We think the sentence should be reduced to one of six weeks' imprisonment.

Sentence reduced.

A. L. B. T.

ARTHUR WESTFALL, OTHERWISE MAURICE MURPHY.

A statement by the prisoner that the police officer who arrested him used improper violence in doing so is not an "imputation" on "character" within s. 1 (f) (ii) of the Criminal Evidence Act, 1898, nor is a suggestion in cross-examination that the prosecutor is a habitual drunkard, nor a statement made before the magistrate, to the effect that the whole of the evidence for the prosecution was concocted, put in by the prosecution at the trial, but not made the basis of the defence.

This was an appeal against conviction on a point of law. Appellant was convicted at the Central Criminal Court before Mr. Commissioner Rentoul, K.C., on the 27th January, 1912, of robbery with violence, and was sentenced to eighteen months' imprisonment with hard labour.

G. St. J. McDonald for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The ground of appeal in this case is that the prisoner's previous convictions were brought before the jury without any justification within s. 1 (f) (ii) of the Criminal Evidence Act, 1898. The prisoner was indicted with a man named James Barron, and the prosecutor was named Charles Foile. The prisoner, in the witness-box, made attacks on the magistrate and on certain police officers, but none of these were witnesses for the prosecution. Against the magistrate he said that he had not been allowed to call a witness for the defence, though he had asked for him to be called on three occasions, but I withdrew any charge against the magistrate; it may have been that the prisoner asked for the witness to be called at the wrong time, and that when the proper time came the matter was overlooked.

[CHANNELL J.: Since the Criminal Evidence Act, 1898, came

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into force the questions which are put by magistrates to a prisoner are misleading, and ought to be altered.]

As against the police the prisoner said that at the police station he asked the prosecutor if he was sure he had lost four shillings, and he answered, "No, sixpence," and that then Detective-Sergeant Bradley whispered to the prosecutor, "You have lost four shillings." The prisoner said he protested, and was then struck in the face with a book by the inspector. Bradley was called by the prosecution, but I objected successfully to his giving evidence; the inspector was called by the judge after the case for the defence was closed. Police-Constable Hayward was a witness for the prosecution, and the prisoner said that this officer had knocked him down; this was an attack on his conduct only, and not on his character, and so does not come within the terms of the section; further, it was never suggested at the trial that the evidence was admitted in consequence of any attack on Hayward. The prisoner gave evidence at the end of the first day of the trial, and at the opening of the second day the judge suggested that in consequence of the attacks made by the prisoner on the police "and the witnesses," he should be cross-examined as to character; this was done, and the prisoner admitted having been sentenced in 1906 to four years' penal servitude for stealing from the person; the judge then read out a list of his convictions. Nothing had been done to justify this, and therefore the conviction should be quashed.

Alfred Taylor for the Crown. Even if the reasons mentioned do not come within the terms of the section, attacks were made on witnesses which properly let in evidence as to the prisoner's character. In the cross-examination of the prosecutor, Foile, who was a potman, it was suggested not merely that he was drunk at the time of the offence, but that he was habitually drunk. That was an imputation on the character of the prosecutor within the meaning of sub-s. f (ii) of s. 1 of the Criminal Evidence Act. Then before the magistrate the prisoner said, "I told you I had a witness who could prove it was all falsehoods they were making up;" his statement was put in by the prosecution at the trial, and was a charge against the police of concocting a plot against

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him; two police officers gave evidence against him, so this charge came within the section.

HAMILTON J.: In this case Arthur Westfall appeals against his conviction on a ground of law, namely, the misreception of evidence as to his character. He was charged with robbery with violence, and the defence raised was that of mistaken identity; that although he was in the neighbourhood, there were many others there, and that he was not the man who had committed the crime. At the beginning of the second day's hearing the judge made known at some length to the counsel for the prosecution that he was at liberty to cross-examine the prisoner as to his previous convictions. It was then put to, and admitted by, the prisoner that in 1906 he had been convicted of stealing from the person, and sentenced to four years' penal servitude. Then the judge, to shorten matters, as he said, read out from the Calendar a number of other previous convictions. In the conduct of a case where the balance hung fairly evenly, as it did here, the admission of such evidence was most material, and the question arises whether the prisoner had made himself liable under the Criminal Evidence Act, 1898, to have his character gone into; was the nature or conduct of the defence such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution? The grounds on which the judge proceeded were that a severe and unwarrantable attack had been made on the members of the police force who were concerned in collecting the evidence in the case, and taking the charge. The prisoner had made statements in the police-court, and repeated them in his evidence at the trial, to the effect that during the hearing before the magistrate he had been unfairly deprived of the opportunity of calling a witness whom he thought important for his defence, and that at the police station the prosecutor had been coached by a detective as to the sum of which he had been robbed, and that the inspector struck him, the prisoner, in the face with a book when he protested. These circumstances were the grounds on which the judge acted, but the magistrate did not come within the terms of the Act, and as to the police officers, neither those connected with the suppression of the prisoner's protest, nor those connected with the coaching of the prosecutor

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were witnesses called in the case, nor were they the prosecutors. So the ground on which the judge acted was not within the words of the section.

Two further grounds have now been suggested as sufficient to render the evidence admissible. One is that the prosecutor himself was accused in cross-examination, not merely of having been drunk, but of being a habitual drunkard. That made sufficient impression on the judge to make him tell the jury that there was no real ground for the imputation, but there does not appear to have been enough said to constitute this such an imputation on the prosecutor as to render it from the nature of the defence an attack on his character and so expose the prisoner to such very serious consequences. The other point is that the prisoner made a charge of improper violence against the constable who arrested him, and who was the first witness for the prosecution. That no doubt was a suggestion that the constable was not only mistaken in arresting him at all, but that he acted in an improper manner. On the authority of *Preston*, [1909] 1 K. B. 568; 78 L. J. K. B. 335; 100 L. T. 303; 73 J. P. 173; 53 S. J. 322; 25 T. L. R. 280, affirming *Bridgewater*, [1905] 1 K. B. 131; 74 L. J. K. B. 35; 91 L. T. 838; 53 W. R. 415; 69 J. P. 26; 20 Cox C. C. 737; 21 T. L. R. 69, this does not seem to us to be such an imputation against the witness's character as to let in cross-examination of the prisoner as to his previous convictions. Such questions often have to be asked if the evidence is to be properly tested. Instead of being an attack on the character of a witness with the view of shewing that he is unreliable, they are an endeavour to elicit the facts in connection with the very matter with which the prisoner is charged. It was not such an attack as comes within the meaning of the section.

It was also suggested that the cross-examination became admissible because before the magistrate the prisoner made a statement to the effect that the whole evidence against him was concocted, which statement was put in evidence in the usual way by the prosecution at the trial; but this was not so much the basis of the defence as would justify us in saying that the nature of the defence involved imputations on the character of the witnesses for the prosecution. These are the only matters on which it is possible to suggest that evidence as to character

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was admissible; such evidence could not but greatly prejudice the defence, and the result is that the conviction must be quashed. The prisoner must remain in custody in order that the other indictment against him may be dealt with.

Conviction quashed.

A. L. B. T.

WILLIAM WARD.

Severity of sentence.
Charges against a person already convicted should be brought as early as possible.

This was an appeal against sentence, by leave of Channell J. Appellant was convicted at the Salford Hundred Sessions on the 19th February, 1912, of housebreaking, and was sentenced to eighteen months' imprisonment with hard labour.

The appellant, who was not present, was not represented by counsel.

G. C. Hans Hamilton for the Crown.

HAMILTON J.: This is an appeal by leave of Channell J. against a sentence of eighteen months' imprisonment with hard labour for housebreaking. This crime was committed at Bolton in June, 1910. The prisoner was an old gaol-bird, and shortly afterwards he committed another offence, for which he was convicted at the Wakefield County Sessions on the 17th October, 1910, and sentenced to eighteen months' imprisonment with hard labour. A few days later the Bolton police first became aware that he was in custody. He served the term, and was at liberty long enough to neglect his wife and family, for which he was sentenced to one month's imprisonment. He was then, in February, 1912, charged with the crime committed in June, 1910. The facts were not brought prominently to the notice of the judge; if at the trial in 1910 the prisoner had confessed to this crime, the Court would have taken that into account, and it is not to be sup-

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posed that a sentence would have been imposed which was substantially longer than that which he received. The Bolton police took no proceedings until February, 1912, and it is contrary to the generally accepted policy that a person, having served his sentence and come out of prison, should find the prospect of another term of imprisonment before him. Following *Sullivan*, 6 Cr. App. R. 4 (1910), the Court reduces the sentence to one of six months' imprisonment with hard labour.

Sentence reduced.

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE CHANNELL, AND MR. JUSTICE PHILLIMORE.

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EDGAR GORDON.

The Court will not, as a rule, grant bail to a prisoner pending his appeal.

This was an application for bail having been referred to the full Court by Channell J. Appellant was convicted at the Central Criminal Court before Judge Lumley Smith, K.C., on the 29th February, with a man named Cousins, of conspiracy to defraud, and of obtaining money by false pretences, and was sentenced on the 1st March to two years' imprisonment with hard labour.

Valetta for the appellant, who was not present. The charges against the prisoner had reference to the business he carried on as an outside broker under the name of the Equitable Exchange, and the matter was one of considerable complexity, as is shewn by the fact that there were one hundred and eighty exhibits. He was granted bail before his trial, and as he is now appealing against his conviction, he applies for bail in order that he may personally go into the matter and see his witnesses.

R. D. Muir for the Crown. Bail ought not to be granted in this case: it is only granted in exceptional cases, *e.g.*, when the appeal will take some time to come into the list, or where a difficult point of law is raised and the judge at the trial thinks the case one in which there ought to be an appeal; neither is the case here. The defendants did not go into the witness box, and the false pretences proved were of a very serious nature.

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DARLING J.: No sufficient reason has been shewn to the Court why the unusual course should be taken of granting bail to a convicted prisoner.

Application refused.

Solicitors for the Applicant—*Osborn & Osborn.*

A. L. B. T.

CYRIL FREDERICK WILLIAM FRYER.

"Credit" within s. 31 of 46 & 47 Vict. c. 52 (The Bankruptcy Act, 1883) may be obtained even though security for the debt is given.

On a charge of obtaining by false pretences, one of the pretences averred being that defendant was a man of means, evidence as to the state of his banking account for some time past may be admissible.

This was an appeal against the conviction both on a point of law and on fact, the latter by leave of Channell J. Appellant was convicted at the Central Criminal Court on the 31st January, 1912, of obtaining credit to the extent of £20 or upwards without disclosing the fact that he was an undischarged bankrupt, and with obtaining goods by false pretences, and was sentenced on the 2nd February by Judge Lumley Smith, K.C., to one month's imprisonment and eight months' imprisonment respectively, both in the second division, the sentences to run concurrently.

E. J. Purchase for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The indictment in this case contained three counts; the first was under s. 31 of the Bankruptcy Act, 1883, for obtaining credit to the extent of £100 from the Brompton Motor Co., Ld., and two of the directors of that company, named Arkwright and Williams, without disclosing the fact that he was an undischarged bankrupt; the second was under the Debtors Act, 1869, for obtaining credit by fraud other than false pretences; and the third was for obtaining a motor-car by false pretences. He was convicted on the first and third counts and acquitted on the second. The appellant is an architect and surveyor, and about the end of May last he was introduced to Arkwright with the purpose of buying a motor, which was to be

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let out on hire in connection with the approaching Coronation to guests at the Wellington House Hotel. On the 10th June a bargain was arrived with Arkwright for the purchase of two cars at a price of £300; £100 was to be paid in cash, and a seven weeks' bill given for the balance; further, the prisoner, who was a director of the Wellington House Hotel, offered as collateral security five hundred fully-paid £1 shares in the hotel; he represented that he had a contract with a Paris bank for the sale of a large number of these shares to it at 20 francs. The matter then passed into the hands of Williams, who admitted that his part in the transaction was purely formal. On the 14th June a bill for £210 was given by the appellant, £50 was paid for a Mercedes car, which was delivered, and a blank transfer for 500 shares in the Hotel Company, signed by appellant, was given to the Brompton Motor Co. The other car was never delivered, and dropped out of the transaction altogether. After the car was delivered, Arkwright, who had expected share certificates to be deposited, began to make enquiries, and found that the position of the hotel was not as satisfactory as he had been led to suppose, and he tried without success to get the car returned.

On the first count, my submission is that the appellant did not obtain credit within the meaning of the section, since security was given to the full amount of the indebtedness. The judge, in his summing up, said: "There is the fact that he got credit for the balance for seven weeks." No question was put to the jury as to the adequacy of the security, and they should have been directed on this point. The fact that security is demanded shews that the creditor does not look to the debtor's personal ability to pay, which is the meaning of giving credit.

On the third count, seven false pretences were alleged in the indictment, but the material ones were: (1) that the shares in the Hotel Company of a face value of £500 had a market value of over £205; (2) that the appellant was the registered proprietor of, and in a position to transfer, five hundred shares; and (3) that the document deposited was a good and valid transfer of shares. The appellant told Arkwright that he had sold twenty thousand shares in the Hotel Company to a French bank at 20 francs a share, and that the money was coming to him in six weeks. He produced the contract, and I submit it was this that mainly influenced Arkwright. It was not a bogus contract, and, at any

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rate, it was the only fraud it was possible to suggest, and it was not one of the false pretences alleged in the indictment. As to the market value of the shares, Arkwright admitted that the appellant shewed him three contracts, and that on these he exercised his own discretion. The transfer was only shewn to Arkwright after the car was delivered, so he could not have been influenced by it.

Evidence as to the appellant's banking account, and as to a number of cheques on it being dishonoured during the last year, was admitted, wrongly in my submission; having regard to the acquittal on the second count, it is clear that the jury thought he *bonâ fide* expected to receive money on the Paris contract, but were influenced by the state of his banking account. Lastly, the judge did not direct the jury that they must find that Arkwright was influenced by the representation made.

W. H. Leycester, for the Crown, was not called on.

PHILLIMORE J.: The appellant was tried at the Central Criminal Court on three counts; the first was for obtaining credit to the extent of £20 or upwards without disclosing the fact that he was an undischarged bankrupt. As to this, the point is taken that you do not obtain credit if you offer some security besides the personal obligation to pay. There may be cases where no credit is given at all; for instance, when an exceptionally valuable jewel is pledged for a sum which is obviously less than its value. But where a man obtains goods on the faith of a bill of exchange and on the security of a deposit of shares, not of undoubted value, it is clear that credit is given; there is a personal trust in him none the less, though it is not to the extreme extent. So the appellant was rightly convicted on this count.

On the second count for obtaining credit by fraud other than false pretences, he was acquitted, not unnaturally, because the jury came to the conclusion that there had been false pretences.

On the third count, that of obtaining the motor-car by false pretences, several alleged false pretences were set out in the indictment, three of which related to the security given other than the bill, namely, that the shares had in fact a value of £205, that he was the registered proprietor of them, and that the paper was a good and valid transfer. As to the last, there may be some-

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thing in the point that it was not produced until after the bargain was completed; but it was proved that he was not the registered proprietor of any shares, so a transfer by him in the circumstances was worth nothing. The main matter, however, was that the shares were practically worthless; a receiver had been appointed for the debenture holders, and while it is true one witness said the shares might be worth three shillings apiece, there was other evidence to the effect that the whole of them were not worth sixpence. Against that a contract with a Paris bank was produced, purporting to shew that the bank was to take a large block of shares at twenty francs. It is true that there was such a paper, but the bank had so far come to their senses that they refused to complete the contract. Among the inducements by which the appellant induced the bank to enter into the contract was the perfectly untrue statement that a group of financiers were going to guarantee six per cent. interest. By these and other pretences the appellant led Arkwright to think that the shares were valuable and to part with the car. Both the bill and the shares were in fact worthless.

Two other points are raised, firstly that evidence as to the appellant's banking account was improperly admitted. There are various reasons why it was admissible. Some of the averments made were that he professed to be a man of financial strength, and able in due time to meet the bill; it was therefore proper to look at the account. Secondly, it is suggested that there was no specific direction as to whether the false pretences operated on the mind of the director of the company defrauded. It is true they were not referred to in terms, but the reason is obvious; no one had questioned that the director parted with the car on the strength of the representations; the only issue raised was as to whether they were false and fraudulent to the knowledge of the prisoner. The summing up is open to verbal criticism, but no comment on the subject was made at the trial. The appeal therefore fails.

Appeal dismissed.

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In view of the decision in Leach (7 *Cr. Ap. R.* 157), *the correct practice, when the defendant's wife or husband is a competent but not a compellable witness, is that the judge should inform her or him, when tendered as a witness, that she or he may object to give evidence.*

Reference by the Home Secretary. The Court of Criminal Appeal had already dealt with an appeal by the prisoner and, after hearing arguments in the case, and in the case of *Richard Leach*, which raised the same point of law, dismissed the appeal in both cases on the 19th December, 1911. (See above, p. 84.) On 26th February, 1912, the House of Lords reversed the order of the Court of Criminal Appeal in the case of Leach (see above, p. 171), and the appeal of Acaster was in consequence referred to the Court for further consideration by the Home Secretary.

Appellant was convicted at the Leeds Assizes on the 18th November, 1911, before Phillimore J., of carnal knowledge of a girl under sixteen, and was sentenced on the 25th November to fifteen months' imprisonment with hard labour.

Valentine Ball for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The appellant was convicted under the Criminal Law Amendment Act, 1885, and the House of Lords has now decided that the effect of s. 4 of the Criminal Evidence Act, 1898, is to make the wife of a prisoner a competent, but not compellable, witness for the prosecution against her husband in proceedings under the Criminal Law Amendment Act, 1885; that was the position of the wife under s. 20 of the Act of 1885, as regards a charge such as this, so no alteration has been effected by the Act of 1898. The appellant's wife gave evidence for the prosecution before the magistrates, when she said that she wished to shield her husband; the prisoner was not represented, so no formal objection was taken. At the trial she was too ill to appear, and her depositions were read. In effect, she was compelled to give evidence. My submission is that she ought to have been warned before giving evidence that she could refuse to give evidence if she wished; in the proceedings in the House of Lords it was stated by noble and learned lords that it was for the witness or the judge to take the

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point. Even if she did not do so then, it does not follow that she would not have done so at the trial, and the case should have been adjourned until she could attend. Though such a course would not be possible where the witness had died, there should always be an adjournment where there is still a possibility of her attending. It is apparent on the face of the depositions that the wife did not wish to give evidence, and had she known that she had the right to object she would have done so. Her evidence should therefore be treated as if she had raised the objection.

Horace Wilson for the Crown (who was called on only as to whether the statement by the wife that she wished to shield her husband was equivalent to her taking the point that she did not wish to give evidence, with the result that the whole of her evidence should be excluded). The proper time to raise the objection is before the witness is sworn, or at the latest before she begins to give evidence. A desire to shield her husband is to be expected in a wife, unless ill-feeling exists, as to which there was no suggestion in this case. The suggestion that the witness ought to be warned by the magistrate or judge is adding something which does not appear in the statute. If the Court thinks that this case is within the spirit of the decision in *Leach*, the Crown does not wish to press the conviction, but appellant is asking the Court to make an assumption which the previous Court refused to make.

DARLING J.: This case comes before us in peculiar circumstances. It has already formed the subject of an appeal to this Court, when the Court was formed of three judges, none of whom are sitting to-day. They decided the case, and with it that of *Leach*, which raised a similar point. In Leach's case the wife was called as a witness by the prosecution, but she objected that she was, though a competent, not a compellable witness, and that she was unwilling to give evidence. It was argued for the prosecution that she was a compellable witness by virtue of s. 4 of the Criminal Evidence Act, 1898, and it was so held by the judge. The Court of Criminal Appeal decided in *Leach's* case that the wife was a compellable witness; the case was taken to the House of Lords, who decided that the wife, though competent, was not compellable

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and as Leach's wife had taken the objection, the conviction was set aside. Acaster's case, which came before the Court on the same day, was dealt with in the following way:—"In Acaster's case no objection was taken by or on behalf of the prisoner or his wife that the latter was not compellable to give evidence. It is common ground that she was a competent witness, and therefore her evidence was admissible, unless we are to assume that if she had been present at the trial she would have objected to give evidence, an assumption which we are not disposed to make." [1912] 1 K. B. at p. 491; 7 Cr. App. R. at 88.

The evidence of the wife in Acaster's case was given in this way; she was called for the prosecution before the justices, and gave evidence without taking any objection, unless she took it in the course of her examination by the solicitor for the prosecution, after her evidence had gone so far to exculpate the prisoner that the solicitor asked leave to cross-examine the witness as to a statement she had signed, when she said "I wish to shield my husband." This case has now been sent back to this Court for reconsideration in consequence of the decision of the House of Lords in *Leach's* case.

It is admitted that the witness was competent, it is admitted since *Leach's* case that she was not compellable, but unless she took an objection she may be asked all the questions she was asked in this case. The only suggestion made for the appellant is founded on a passage which occurred in the argument in *Leach's* case in the House of Lords, where the Solicitor-General asked whether it was suggested that the prosecution, when a wife came to give evidence, should raise the question whether she knew she could refuse to give evidence, and Lord Atkinson said it was for the witness to take the point, and the Lord Chancellor added "Or for the judge." Speaking for myself, and I think for the other members of the Court, in consequence of these observations I shall, when the wife—in any case where she is not a compellable witness—comes to give evidence against her husband, ask her: "Do you know you may object to give evidence?" and I shall also do so if she is called on behalf of her husband. That, I imagine, is what other judges will do for the present, though there is no decision which binds us to do it, and the point is open to argument on an appeal to this Court. So far none of us here remember to have ever done it, nor did it occur to us before that it was necessary.

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The witness, being called, might have objected; it is true she was not warned that she had this right, no one—so far as we know—ever had been. If she had been present at the Assizes she might have declined to give evidence, but there is nothing to satisfy us that she would have done so any more than there was anything to satisfy the Lord Chief Justice. She did not come to the assizes; it was proved that she was too ill to attend, and so, by the statute, her depositions became admissible in evidence and they were admitted. It is now said that the judge ought to have excluded them, and to have adjourned the trial until the witness could be present. The judge followed the ordinary course, the course prescribed by the statute, and he did right to admit the depositions in evidence. If the objection could have been taken it could have been taken before the justices. On what ground ought the case to have been adjourned? It is useless to say the depositions ought never to be admitted in such cases, for it is obvious they can be in the case of the death of the witness. It is suggested that, though she had not objected to giving her evidence before the justices, she ought to be given a chance of reconsidering her decision; there is no authority for saying that such a course ought to have been adopted.

Alternatively it is argued that she did object before the magistrates. She was being—practically—cross-examined, treated as a hostile witness by the prosecution, and she said, "I wish to shield my husband." Are we to treat this as equivalent to her saying that she did not wish to give evidence? To hold this would be to come to a decision on a question of fact different from that arrived at by the three judges who heard the appeal originally. The expression is ambiguous; if a woman, on coming into the witness box, were asked if she wished to give evidence, and answered, "I wish to shield my husband," the judge would say, "The question is whether you wish to give evidence or not." Everyone knows that the best way of shielding her husband would be for her to give evidence, truthful if he were innocent, untruthful if he were guilty, and the expression might well mean that she wished to give evidence favourable to her husband. Are we to conclude that the wife meant she did not wish to give evidence at all? We cannot come to this conclusion. A competent witness was put in the box; she did not take the objection. There is no decision that before giving evidence she

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must be asked whether she knows that she has the right to object to doing so, and there has been no such general practice. On none of these grounds can the appeal be allowed.

Then does it appear on the face of the proceedings that there was a miscarriage of justice? We think not. Her evidence had very little weight in convicting the prisoner; it dealt with facts that were otherwise established, and therefore had very little importance. The appeal, therefore, must be dismissed.

There are many statutes in force dealing with the right to give evidence by accused persons and their wives, but they do not all use the same language as to their ability or disability to do so. Confusion has arisen, and must arise, from the necessity of searching through various statutes to find what particular words apply. A glaring instance of this is to be found in the Incest Act, 1908, s. 4 (4) of which says, "Section 4 of the Criminal Evidence Act, 1898, shall have effect as if this Act were included in the schedule to that Act"; that is, an Act passed in 1908 is to be included in the schedule to an Act passed ten years earlier. The Court desires to say that the confusion in regard to the matter is such that it is earnestly to be hoped that the Legislature will pass a short Act which would put the matter beyond all doubt in the interests of those who have to administer justice.

Appeal dismissed.

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE CHANNELL, AND MR. JUSTICE PICKFORD.

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HARRIS CARTER.

The Court will not grant leave to appeal if, despite unhappy expressions in the summing up likely to injure the defence, it is of opinion that, on the whole, there was no misdirection.

This was an application for leave to appeal (refused by Channell J.) against conviction and sentence. Applicant was convicted on the 4th March, 1912, at the Central Criminal Court, before Mr. Commissioner Rentoul, of feloniously receiving stolen goods, and was sentenced to twelve months' imprisonment in the second division.

R. D. Muir (with him *Curtis Bennett*) for the applicant, who was not present. The applicant was charged with stealing thirty-six cases of sardines, with a second count for receiving; only the latter count was left to the jury. The sardines were stolen on the evening of the 24th, or morning of the 25th January, and were found in the possession of a man named Joseph or Solomon Magnus about the 5th February. He told the police that he had bought them from the applicant and had paid for them by cheque. The applicant, when questioned by the police, first denied having sold any sardines to Magnus; then, on being shewn the cheque, stated that it related to a milk transaction, and finally, on being shewn the sardines, said that he bought them with the permission of Magnus. It is obvious that Magnus had to account for the possession of recently stolen property, and he threw all the blame on the applicant. At the police court Magnus, in cross-examination, denied having been ever convicted, or even charged, before; at the trial he admitted having been sentenced

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sixteen years previously to three years' penal servitude for larceny and receiving, but gave an untrue account of the circumstances, alleging falsely that he pleaded guilty to save his brother. The applicant had a clean record. As it was the oath of Magnus against the oath of the applicant, Magnus's conviction and his denials and falsehoods were all very material for the consideration of the jury.

The jury were never told what the real charge was, nor what the prosecution had to prove. The judge said in his summing up that the prisoner was indicted for being "found in possession" of goods recently stolen, which assumes that he must be found guilty unless a reasonable explanation is given; the proper direction in such a case is that that is evidence on which the jury may find the prisoner guilty.

[DARLING J.: In *Powell*, 3 Cr. App. R. 1 (1909), the Lord Chief Justice is quoted as saying "The possession of recently stolen property throws on the possessor the onus of shewing that he got it honestly," but if he said that, he qualified it by what he said in other cases.]

There is also an improper direction on a question of fact; after saying that it was proper in the circumstances for the defence to bring out the fact of Magnus's conviction, as juries were more likely to attach weight to the evidence of a witness who came through the door of the Court than of one who came from the dock, the judge added, "because with regard to the man who comes from the dock there is a kind of suspicion hanging about him. His case is such that the magistrate has thought it a fit case to be heard and investigated. The grand jury have thought it a fit case to be heard and investigated by an ordinary jury in this Court, and therefore he does come with a cloud over him when he comes from the dock into the witness box. There is no question about that at all;" and later he said, "The one man is under the cloud of having been once convicted, the other man is under the cloud of coming from the dock into the witness box, and I think you might therefore balance the two very fairly against one another."

Leave to appeal against sentence should be given. After verdict a police constable stated that the applicant had been suspected of receiving, and stated that parts of cases of butter which

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had been stolen had been found in his possession, adding that he had been charged, and the Alderman had discharged him owing to insufficient evidence, although the wood had been identified. The Alderman had said that the evidence of identification was insufficient, so the constable was setting up his opinion against that of the Alderman.

DARLING J.: The Court sees no reason for giving leave to appeal in this case. There is distinct evidence that the applicant received the property knowing that it was stolen. It is said, however, that the judge did not properly direct the jury as to the law relating to receiving. He did not give a model direction, there is no doubt, but having regard to the simplicity of this type of case, and to the knowledge and common sense of a jury, we think that, though the direction was not felicitously expressed, there is no ground for granting leave to appeal. These are the points taken on behalf of the applicant. Magnus, to whom the applicant sold the sardines, had, no doubt, been convicted when a very young man of dishonesty; nothing is suggested against him since. He was quite properly cross-examined as to character, and a direction to that effect would have been sufficient, but the judge went on to give expression to some very curious views as to the prisoner being under a cloud. At first I think he meant it in favour of the prisoner, that they must not assume that he was as bad as Magnus because he was in the dock; that he was at an obvious and clear disadvantage, and not able to make such a good impression coming from the dock to the witness box as if he came as a free man. But he went on to say something dangerous: "The one man is under a cloud of having been once convicted, the other man is under the cloud of coming from the dock into the witness box" (so far what he said was true), "I think you might therefore balance the two very fairly against one another as regards any prejudice or doubt you might feel." If he had stopped there it would have been absolutely wrong; it was most clumsily expressed, and calculated to injure the case for the defence; but he added, "But you have to remember that in a case of this sort, if you are in doubt as to whether the witness is telling the truth, whether his story is the honest and true story or the prisoner's is the honest and true story, the prisoner being the man in the dock, you have to give him the

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benefit of any doubt that exists in your mind." Looking at the whole sentence, it is impossible to say that it was misdirection, or that it prejudiced the jury against the prisoner. In our view the conviction was right. As to the sentence, twelve months' imprisonment is not undue, seeing that the circumstances of the case point to the fact that the applicant was probably a professional receiver.

Application dismissed.

Solicitors for the Applicant—*S. Myers & Son.*

A. L. B. T.

WILLIAM WHITTOCK AND ARTHUR COLES.

Leave to appeal granted in view of a suggestion against the character of a witness for the prosecution.

These were applications for leave to appeal against conviction and sentence, and to call further evidence. Applicants were convicted at the Central Criminal Court on the 29th February, 1912, before Judge Rentoul, K.C., of conspiracy to steal, and each was sentenced to eighteen months' imprisonment.

F. St. John Morrow for the applicants (under s. 10 of the Criminal Appeal Act), who were not present. The applicants were charged with attempting to steal from the slot gas meters of the Brentford Gas Company, and with inciting employés of that company to steal. The evidence for the prosecution mainly depended on a fitter in the employ of the company named Stephens and his mate Gough, but though Stephens stated he first met the prisoners on the 15th December, his evidence is uncorroborated until the 13th January, the day on which the prisoners were arrested. In these circumstances Stephens's character is of importance. I put it to him that he had been dismissed by the Gas Light and Coke Company for taking money from gas meters; he admitted he had been dismissed, but said that they gave him a reference, and said that if he had been guilty they would not have done so: I called for it, and it proved to be a piece torn off a letter, and not in any sense a reference.

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In his summing up the judge said it was a serious case for the prisoners and also for the two witnesses, as if the prisoners were not convicted a stigma would be cast on the witnesses. For these reasons leave to appeal against conviction should be granted.

The sentences were too severe; Coles has not been convicted previously, and Whittock has had only two or three minor convictions, the last of which was fifteen years ago.

DARLING J.: The case appears to the Court just fit for further argument, so leave is given to appeal against conviction and sentence, but not to call further evidence.

Leave to appeal granted.

A. L. B. T.

[The appeal was heard on April 3rd, and dismissed.]

JOHN MARTIN.

A habitual criminal, so found under 8 *Edw.* 7, c. 59 (*the Prevention of Crime Act*, 1908), *cannot, as of right, appeal against conviction.*

This was an application for leave to appeal against conviction as a habitual criminal, referred to the full Court by Channell J.

Applicant was convicted on the 5th March at the County of London Sessions of countinghouse-breaking, and of being a habitual criminal, and was sentenced to three years' penal servitude and five years' preventive detention.

C. B. M. Hodgson for the applicant (under s. 10 of the Criminal Appeal Act), who was not present. The applicant has a right to appeal against his sentence by virtue of s. 11 of the Prevention of Crime Act, 1908, and in view of this fact and the circumstances of the case the Court should grant leave to appeal.

CHANNELL J.: The Court gives leave to appeal, but it is given

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on the merits, and we do not accede to the argument that it should be given as of right. That would be contrary to the words of the Act of Parliament.

Leave to appeal granted.

A. L. B. T.

HUGH SADLER BEECH.

If under a well-grounded apprehension of personal injury by the defendant anyone in escaping therefrom is physically hurt, the defendant is guilty of inflicting grievous bodily harm within s. 20 *of* 24 *&* 25 *Vict. c.* 100 (*the Offences against the Person Act*, 1861).

Halliday (*C. C. R., below*) *followed.*

This was an appeal against conviction on a point of law, and there was also an application for leave to appeal on fact. Appellant was convicted on the 24th February, 1912, before Lord Coleridge J., at the Chester Assizes, of inflicting grievous bodily harm, and was sentenced on the 1st March to twelve months' imprisonment in the second division.

R. V. Bankes, K.C. (with him *E. O. Roberts*) for the appellant, who was not present. The appellant was a man of respectable family, and the story of the prosecution is that he broke into the house of the village nurse and attempted to force open her bedroom door, with the result that she jumped out of her window, which was eleven feet from the ground, and so received serious injuries. This happened, the nurse said, at 11.45 p.m., and at about 2 a.m. she found herself at the house of the rector a quarter of a mile away, having got there through fields. I put it to the nurse in cross-examination that she had had connection with the appellant on several occasions, whereupon she offered to be medically examined. She was examined by four doctors, who agreed that she was physically a virgin, but the leading doctor admitted that this was not a conclusive test. The appellant's story was that he went upstairs, had a conversation with the nurse about a girl with whom he was keeping company, and of whom she was jealous, and left by

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the back door. He called three witnesses, who contradicted the nurse on the only points in her evidence on which she could be contradicted. There were various points in the nurse's story which rendered it very improbable. She said she locked the front and back doors when she went to bed. The appellant came into the house by the window and left by the back door, but both doors were found open by the police. This point was not referred to by the judge in his summing up. She said she jumped out over a paved path three feet six inches wide on to earth, and squeezed through a gap in a railing which I brought evidence to shew was only three and a half inches wide, but her clothes were never produced to shew the marks that would have been caused. There was no outside sill to the window from which she jumped; she stated she stood on the inside sill and jumped through the window, which was three feet six inches high. I submit that it was impossible to do so, and clear the path. She gave no explanation as to what she was doing between 11.45 p.m. and 1.45 a.m., and she made no effort to arouse the neighbours who lived in the other half of her house. She explained that she had reason to fear because the prisoner had before tried to assault her indecently, when she had attempted to take poison; the only corroboration of this was a conversation with the rector which was given in evidence after I had cross-examined her as to whether she had made a complaint. This evidence was, I submit, inadmissible. There was no evidence of any mark or bruise on the nurse.

After the evidence of the doctors, which naturally prejudiced the minds of the jury against the appellant, a careful summing up was most necessary, but the case was put to the jury in such a way that they could not appreciate that there was any case for the prisoner at all.

The case was not proved by the prosecution, for *Donovan*, 4 Cox C. C. 399 (1850) shews that the facts were not sufficient to justify a conviction for inflicting grievous bodily harm. See also *Martin*, 8 Q. B. D. 54; 51 L. J. M. C. 36; 45 L. T. 444; 38 W. R. 106; 14 Cox C. C. 633; 46 J. P. 228 (1881). The prosecution relies on *Halliday*, 61 L. T. 701; 38 W. R 256; 54 J. P. 312; C. C. R. (1889); but that case is inconsistent with *Donovan*. There was no evidence from which it could be reasonably assumed that the nurse was justified in jumping out of the window.

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Abel Thomas, K.C., and *Artemus Jones*, for the Crown, were not called upon.

DARLING J.: The appellant was indicted for unlawfully and maliciously inflicting grievous bodily harm on Margaret Powell, and the evidence was that they had been at all events on friendly terms. She denied even that, but she called him Hughie; the jury, however, are not bound to assume that the friendship had ever led to any impropriety. What is asserted is that he came to her house very late, when she was in bed. He could not get in in the ordinary way, so he broke in through a window, went up to her room, and beat and kicked at her door; the condition of the door proved this. He had nearly burst in when she jumped out of the window. Round the house was a flagged path, three feet six inches wide; it is said that she did not alight on that, but that jumping from a height of twelve feet, she went beyond. There were marks of feet on the ground and marks as if a body had rolled over after jumping. If the woman did not jump from the window no marks would have been made. The defendant's case is that he went away by the back door, leaving her in the bedroom. The suggestion is made that she cannot have jumped from the window, because the front door was found open, and that as the judge made no remarks on this fact in his summing up an injustice was done to the prisoner's case, since this shews the truth of his story. But he may have opened the front door, seen her lying in the garden, and then thought the other way out was better. He gave an explanation difficult to accept of what he went there for and what he did there, but he took a course which made it certain that the jury would disbelieve anything he said unless there was strong corroboration. He stated that he had frequently had connection with the nurse, whereupon she offered herself for medical examination, and was examined by four doctors, all of whom declared that she was physically a virgin, and that it was extraordinarily unlikely that anyone could have had connection with her. After that anyone would decline to believe the appellant's story. Mr. Bankes complains that the judge did not put to the jury the points for the defence. The points in question do not appear to us to be of much substance, and they were put to the jury by Mr. Bankes. The judge summed up against the defence; this is not necessarily

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the fault of the judge; the facts and the evidence were against the appellant. In dealing with the facts we are unable to say that the judge omitted to put them properly to the jury or dealt with them in any way wrongly.

Then it is said that the judge gave a wrong direction as to the law on the subject. He put to the jury, "Will you say whether the conduct of the prisoner amounted to a threat of causing injury to this young woman, was the act of jumping the natural consequence of the conduct of the prisoner, and was the grievous bodily harm the result of the conduct of the prisoner?" We think that that was a proper direction as far as the law went; we are satisfied that there was evidence before the jury of the prisoner causing grievous bodily harm to the woman. No one can say that if she jumped through the window it was not the natural consequence of the prisoner's conduct. It was a very likely thing for a woman to do as the result of the threats of a man who was conducting himself as this man indisputably was. The appeal must be dismissed.

Appeal dismissed.

Solicitor for the Appellant—*J. M. Voss,* agent for *J. P. Whittingham,* Nantwich.

A. L. B. T.

OSIAS FREDERICK HORN.

On a charge of indecent assault, when consent is a good defence, it is a grave misdirection to cause the jury to believe that because the defence has not set up consent they may convict, though, in fact, they think there was consent.

This was an appeal against conviction on a point of law; there were also applications to appeal against conviction on fact and against sentence. Appellant was convicted at the County of London Sessions on the 8th March, 1912, of an indecent assault, and was sentenced to six months' imprisonment in the second division.

R. D. Muir (with him *F. Hinde*) for the appellant, who was present. The grounds of appeal in this case are that there was

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no corroboration of the girl's story, that the story in itself is improbable, that the story, if true, would shew that the girl had consented, and that the Deputy-Chairman misdirected the jury. The girl was a domestic servant in the employ of the appellant, and on two important points she was contradicted by the evidence not only of the prisoner, but also of his wife.

In his summing up the Deputy-Chairman asked why a girl who was apparently respectable should concoct such a story, and mentioned that blackmail and consent were causes which sometimes led to the concoction of such charges, and then he added, "As regards consent, first consent in this case has not been raised as a defence, the defence here is a complete denial, although some of the surrounding circumstances might lead you to suppose —lead you to say almost without doubt—that if consent had been the defence raised here, you would not have found the defendant guilty, because some of the girl's actions seem to have been the actions of a girl who was likely to have consented," and he then mentioned the actions to which he was referring. This was a clear misdirection: it had in fact been argued by the defence that if there was consent on the part of the girl the accused could not be convicted. It is for the prosecution to negative consent, and the jury should have been so directed; see *Bradley*, 4 Cr. App. R. 225; 74 J.P. 247 (1910). The jury, no doubt, were misled into believing that, as the appellant had not raised the defence of consent, they need not consider the evidence as to it.

(He was stopped by the Court.)

Brinsley Nixon for the Crown. The Deputy-Chairman did not tell the jury consent need not be considered; only that as it had not been suggested by the defence, it was difficult for them to consider it. Further, it would have been correct to tell them so since the prisoner denied any such suggestion. The remarks made by the Deputy-Chairman in sentencing the prisoner shew that all he meant was that had the appellant alleged consent there were circumstances in the case which would have raised a doubt, and rendered it unsafe to convict. There is no impropriety in treating the defence in the same way as in a civil case with pleadings when the suggested defences are inconsistent. The Lord Chief Justice, in *Stoddart*, 2 Cr. App. R. 217 at 245; 73 J.P.

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348; 53 S.J. 578; 25 T.L.R. 612 (1909), said, "Every summing up must be regarded in the light of the conduct of the trial, and the questions which have been raised by the counsel for the prosecution and for the defence respectively." If there was misdirection there was no miscarriage of justice, both parties gave evidence against the suggestion, and only trivial matters are suggested as evidence in favour of it.

PICKFORD J.: The prisoner appeals against a conviction for indecent assault; to support such an indictment it was necessary to prove indecent behaviour, and that it took place without the consent of the prosecutrix. The girl's story was uncorroborated, in some particulars improbable, and in others contradicted by other witnesses and denied by the defendant. It was, therefore, very important that the jury should not be misled as to what were the issues. The case for the defendant was an entire denial of indecency with or without consent. The Deputy-Chairman did not omit all reference to consent, but he dealt with it in this manner (the learned judge read the paragraph from the summing up quoted above). It is said that that direction is wrong because it is in effect telling the jury that even though the circumstances led them to think that there had been consent, they still ought to convict. A passage has been cited to us from *Stoddart*, with which we concur; a summing up must be looked at with reference to the conduct of the case at the trial which often makes it unnecessary to deal with points which might have been raised. But if matters are dealt with they must be dealt with in a way not likely to mislead the jury. We think the summing up in this case was misleading, because it might lead the jury to think that they must convict the prisoner even though they thought that consent to the indecency was proved; the direction, therefore, was one which might lead to a miscarriage of justice. The conviction must therefore be quashed.

Conviction quashed.

Solicitors for the Appellant—*Lewis & Lewis.*

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WILLIAM THOMPSON, *alias* PETTIT. 1912
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Conviction quashed in view of fresh evidence before the Court and other evidence admitted by the Crown as establishing the appellant's case.

This was an appeal against two convictions, having been referred to the Court by the Home Secretary. Appellant was convicted at the Essex Quarter Sessions on the 18th December, 1911, of obtaining horses by false pretences, and sentenced to eighteen months' imprisonment with hard labour, and at the Middlesex Quarter Sessions on the 30th January, 1912, for obtaining a pony and cart by false pretences, and was sentenced to three years' penal servitude, to run concurrently with the other sentence.

On January 22nd, 1912, appellant applied to this Court for leave to appeal against the conviction in Essex, but the application was refused. He then petitioned the Home Secretary.

E. A. Digby for the appellant, who was present. The convictions in these cases turned on the question of identity, and although at various times twenty-one witnesses have identified the appellant as the person involved in these crimes, I am prepared to shew that they were all mistaken, and that the real culprit is a man named Russell, whose career, photograph, and description are before the Court. Russell has disappeared since the 7th February, when the first hint of this appeal appeared in the newspapers.

The two cases are closely connected. The frauds were committed by means of worthless cheques. The pony and trap, the subject-matter of the Middlesex charge, was used by the real culprit, who went by the names of Pettit or Archer, to drive about in Essex when he carried out the other frauds. In the Chelmsford case, the culprit was traced over a period of seven days, and numerous witnesses were called, including the landlords of the inns at which he stopped and farmers whom he defrauded, to identify him.

A short point in the case, which is conclusive of it, is the handwriting. A letter written by Thompson was put in at the Chelmsford trial by the defence, and it shews Thompson to be an illiterate man, who is unable to spell the simplest words correctly. It is admitted that the defence failed to establish con-

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clusively that the cheques and the other documents put in were written by the culprit, but it is submitted that the inference from the evidence as to one (Chelmsford) cheque is irresistible. The evidence, however, did establish that two telegrams were actually written out and sent off by the culprit. These telegrams were not produced when called for by the defence at Chelmsford. They are now in Court, and admitted by the Crown, and it is obvious that Thompson could not have written them or any single document put in by the prosecution at the trial. In the Middlesex case evidence was given by the prosecution that the cheque was written out there and then by the real culprit. This cheque is not in Thompson's handwriting, but it is similar to the handwriting in the documents in the Chelmsford case. The prisoner was undefended at the Middlesex Sessions, and this point was not taken on his behalf, and the jury were told that handwriting was not a matter they need consider.

There are many other points in the case tending to shew Thompson is not the man, but the handwriting is the most important, and is conclusive.

(Counsel proceeded to deal with the details of the various frauds, when he was stopped by the Court.)

The Court asked counsel for the Crown whether they had considered the question of the possibility of the person who wrote these letters being the same as the person who wrote the cheques.

R. D. Muir (with him *Frank Phillips* and *E. C. P. Boyd*) for the Crown. There are many facts in the case which point to the impossibility of the cheques having been written by the appellant, and there are also facts which shew that they must have been written on the spot. If the letters written from prison are genuine it is clear that the appellant did not write the cheques. The prosecution have made enquiries, and can find no evidence that the appellant ever wrote a different handwriting. Further, the evidence shews that when Archer came to Warwick's stables on the 25th September he had a man with him to whom he referred as his son. The witness who identified the appellant as Archer has been shewn a photograph of Russell's son, and identified it as the man who came to the stables. This seems to point to the fact that it was Russell and not Thompson who was there. There is no evidence to shew that Russell and Thompson were

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ever acquainted. Hubbard, Russell's accomplice, who pleaded guilty and has been sentenced, has made a statement that the real name of the man with whom he was engaged in the frauds was Arthur Russell, and he has given details of their transactions together, and also states the address of Russell's son; this agrees with the address on one of the telegrams sent by the culprit.

Mr. Harding, secretary to the Canadian Northern Railway, employed Russell for three years, and he identifies the handwriting in one of the telegrams as being that of Russell. The prosecution are satisfied that a mistake has been made; the photographs of the two men shew some resemblance. The identification of appearance was not the only evidence, a watch-chain having been proved to have been worn by the culprit similar to that possessed by Thompson. A police officer who knew Russell says that he used to wear a similar watch-chain; he also knew Thompson, and says that there are points of resemblance which might deceive.

DARLING J.: In this case the appellant William Thompson was convicted at the Essex Sessions of obtaining horses by false pretences, and at the Middlesex Sessions of a similar offence. He has said that he has been mistaken for another man. No doubt many witnesses were under the impression that he was the man who had made the false pretences and obtained the horses; apparently they were led to this conclusion partly by the resemblance between the two men and partly by the fact that both men wore identical watch-chains. The latter fact is not remarkable; chains of this kind are made by the hundred or by the thousand, and there must be many men wearing precisely similar watch-chains. In a question of identification this is a slight circumstance to shew that Thompson is the man. There was also evidence of personal opinion that this was the man, with which we need not deal.

The case is presented to-day thus: We have a number of documents written by the man who made the false pretences; in these the writing is that of an educated man, well spelt and fluently written, obviously the work of a man who has no difficulty in writing easily and grammatically. We have also a number of documents undoubtedly written by the appellant at different times. If once it is established that these are written

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in his natural way of writing, and not written to disguise his real way of writing, it is impossible that he can have written the other documents which have been referred to; as impossible as for a man of no education to have written letters in Greek or Latin. Mr. Digby has produced a number of letters written by the prisoner, and also a document containing instructions for his defence. The only question is, are we dealing with the genuine habitual writing of the appellant? There is no evidence to shew we are not. One of the documents, an application to this Court for leave to appeal, is better written than the others, but it has been brought to our notice that a warder assisted him in regard to the spelling in this memorial. Mr. Muir states that enquiries have been made, which was easy, owing to the previous career of the appellant, to find if the specimens of handwriting put forward as being those of the appellant are genuine, and it has been admitted that they were written in the way in which he always wrote, and that he never wrote in the cultivated way employed by the man who undoubtedly committed the false pretences.

The Court has come to the conclusion that Thompson cannot be the man who went by the name of Pettit and Archer. It is said that the real offender was a man named Russell, but we are not deciding that. We are satisfied that the conviction cannot be maintained. It is fair to state that that is the opinion of Mr Muir himself, with every document before him. The appeal must be allowed and the conviction quashed.

Muir: There are two indictments in Essex still standing against Thompson. If he is released on his own recognizances the Treasury will offer no evidence in respect of these.

DARLING J.: The Court has in some cases ordered a prisoner not to be released when there are other indictments against him. In this case we order him to be released on his own recognizances to appear at the Essex Quarter Sessions.

Convictions quashed.

Solicitors for the Appellant—*Percy Robinson & Co.*

A. L. B. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE CHANNELL, AND MR. JUSTICE COLERIDGE.

FREDERICK HENRY SEDDON.

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Murder—Circumstantial evidence.

If two persons are indicted jointly, and one is called as a witness for the other, the jury are entitled to acquit the former and to convict the latter, and the judge is not bound to direct them that if they accept the evidence on behalf of the deponent they must accept it on behalf of the other defendant.

This was an appeal against conviction on a point of law, and an application for leave to appeal against conviction on fact. Appellant was convicted at the Central Criminal Court on the 14th March, 1912, before Bucknill J., of wilful murder, and sentenced to death.

Marshall Hall, K.C. (with him *J. Wellesley Orr* and *R. Dunstan*) for the appellant, who was present. The appellant and his wife were indicted for the murder of Miss Barrow, and Mrs. Seddon was acquitted. Miss Barrow died in the appellant's house, where she had been lodging, on the 14th September, 1912, and a medical certificate was given stating that death was due to epidemic diarrhœa. In November the body was exhumed, and on examination traces of arsenic were found. The case for the Crown was that arsenical poisoning was the cause of death, that the appellant was interested in Miss Barrow's death, and in a position to administer arsenic to her. It was further said that Seddon stole her money either before or after death, and that therefore he was a murderer. The case was so enveloped in prejudice, mainly the creation of the appellant, that it was almost impossible to separate the evidence and the prejudice, but it was a case where the proposition advanced in Wills on Circumstantial Evidence, 12th ed., p. 311, should apply: "In order to justify

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the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

This case was unique in that there was an entire absence of evidence connecting the appellant with the poison. The theory of the Crown was that death was caused by a moderately large dose of arsenic administered not less than six, nor more than forty-eight, hours before death, but there was no evidence that the appellant purchased, possessed, or handled any arsenic; that he prepared, administered, or caused to be administered, arsenic to Miss Barrow, that he knew arsenic could be extracted from fly-papers, which was the source suggested by the Crown, that he had any knowledge of poisons, or arsenic in particular, or that he knew that the symptoms of arsenic poisoning were almost identical with those of epidemic diarrhœa. The evidence was perfectly consistent with the arsenic having been taken accidentally or intentionally by Miss Barrow herself, or administered ignorantly by some third person.

The evidence given against the appellant was that he was a very covetous man, and had made a bargain with Miss Barrow by which she handed over her property to him in return for an annuity, for which he gave her no security; that when he found Miss Barrow was very ill he did not send for a doctor; that while the body was lying on the bed he indecently searched the room for money; that he allowed the undertaker to remove the body to a mortuary; that although Miss Barrow had a right to be buried in a vault at Highgate, he made an arrangement with the undertaker to bury her in a pauper's grave for £4, and took commission on this sum; that during her life he had handled six £5 notes which were her property; that on the night of her death he was handling a large sum of money in gold that Miss Barrow was known to have in her possession; that he did not inform her relatives of her death, and that he withheld the real truth as to her financial position from them.

A chemist named Thorley gave evidence that the appellant's daughter, Maggie, bought fly-papers at his shop on the 26th August, seven days before Miss Barrow was taken ill, but his identification of Maggie Seddon was very unsatisfactory, and quite unreliable. Further, the fact that she bought fly-papers was no evidence against the appellant. At the close of the case

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for the prosecution there was no other evidence of fly-papers being in the house, and I submitted that there was no case to go to the jury; if this submission was right any evidence which came out afterwards should not be considered. *Joiner*, 4 Cr. App. R. 64; 74 J.P. 200; 26 T.L.R. 265 (1910).

[*Sir Rufus Isaacs, A.-G.:* But see also *George*, 1 Cr. App. R. 168; 73 J.P. 11; 25 T.L.R. 66 (1908); and *Pearson*, 1 Cr. App. R. 77; 72 J.P. 449 (1908).]

Maggie Seddon, on December 6th, attempted to buy some fly-papers at the shop of a man named Price. The police knew this, but questioned her in such a way as to lead her to deny having gone to any shop for such a purpose. This can only have been done to deprive the one witness who could contradict Thorley of her credibility.

The case was opened and run almost to the end as a joint charge against the two prisoners, so the acquittal of Mrs. Seddon raises a difficulty for the prosecution. What may be sufficient circumstantial evidence on which to convict two persons may be insufficient evidence on which to convict one; see *Hawkins* v. *Powell Steam Company*, [1911] 1 K. B. 988; 80 L. J. K. B. 769; 104 L. T. 365; 55 S. J. 329; 27 T. L. R. 282. I called Mrs. Seddon as a witness for the appellant; the judge directed the jury that if they believed her story they should acquit her, but he omitted to tell them that if they accepted her evidence on her own behalf they must also accept it on behalf of the appellant; this was a serious misdirection. The jury should have been told that it was not sufficient for the prosecution to prove facts consistent with guilt; they must be facts consistent only with guilt; see *Gardner*, 1 F. & F. 669 (1859); and *Franz*, 2 F. & F. 580 (1861). No fact was shewn which pointed only to guilt of murder, though some were shewn which pointed to guilt of theft, and it was the existence of these facts that was so prejudicial to the appellant.

Medical evidence was given that acute pain would be expected about half an hour after taking a fatal dose of arsenic; Miss Barrow died at 6.15 a.m. on the 14th September, and from the fact that she was heard to scream at 12.30 a.m., the dose was probably taken at about midnight. The evidence that the appellant had any opportunity of administering this dose is

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extremely weak. He went out at 7.30 p.m. on the 13th September and did not return till after 12.30 a.m., so he had no opportunity of administering the poison directly. A serious mistake was made in the summing up on the question of opportunity, as the judge stated that the appellant was left alone with Miss Barrow on the 11th September; this was contrary to the evidence.

If the Criminal Evidence Act is not to be a dead letter, but an enabling statute for the benefit of the prisoner, it is the duty of the judge to comment on the fact that the prisoner does give evidence, and to tell the jury that the presumption is that he is speaking the truth until he is discredited by cross-examination or by other evidence. The whole tenor of the summing up was a direction to acquit Mrs. Seddon with no direction as to the appellant, and the points in favour of the defence were mentioned when dealing with Mrs. Seddon, but not repeated when dealing with the appellant. The judge never warned the jury not to let the prejudice surrounding the case affect them, nor pointed out the weakness of Thorley's identification of Maggie Seddon; these omissions amounted to misdirection, and the cumulative effect of the evidence is consistent with the innocence of the appellant.

Sir Rufus Isaacs, A.-G. (with him *R. D. Muir, S. A. T. Rowlatt* and *Travers Humphreys*) for the Crown was not called upon.

DARLING J.: In this case the appellant was indicted jointly with his wife for the murder of Miss Barrow, and after a ten days' trial, and the giving of a large amount of evidence, the wife was found not guilty and the prisoner was found guilty and sentenced to death. Against this verdict he appeals.

We think that before dealing with the points raised it is necessary that we should state what are the powers of this Court under the Act. The powers of the Court do not amount to a re-hearing of the case; we interfere only if there has been a wrong judgment on a point of law, or if the verdict of the jury, having regard to all the evidence in a case, is unreasonable in point of fact, or if on a general view of the case in law and fact it appears that there has been a miscarriage of justice.

Various points have been taken for the appellant in this case;

the first is that there was not sufficient evidence that Miss Barrow died of acute arsenical poisoning. In the opinion of the Court there was ample, and in fact, conclusive, evidence that she did die from that cause. Secondly, that there was no evidence that the appellant was ever in possession of arsenic or ever administered arsenic to Miss Barrow. That is true, but such evidence as that was not essential; had evidence been forthcoming that he was seen to give her arsenic with his own hand, and that she died within a short time thereafter, it would not have been a case of circumstantial, but of direct, evidence. The next point is that the evidence of identification of Maggie Seddon by Thorley was insufficient and untrustworthy; but that was evidence which was fairly left to jury and the question was decided by them; their decision was not unreasonable and the Court cannot interfere on this ground. The next point made was that the evidence of Mrs. Seddon having cashed bank notes was inadmissible as against the appellant, but that the judge omitted to point out this to the jury; it is enough to say that sufficient connection between the wife and husband as to the affairs of Miss Barrow was shewn to make the evidence admissible. A great point has been made here that the wife was called as a witness for the appellant, so she could be asked anything that could be asked of any other witness for the defence; the questions were perfectly legitimate.

Then it was said that the wife and the appellant were jointly charged with murder; that the evidence was directed equally against both, and there was no evidence on which the jury could discriminate between them, and that the verdict was therefore unreasonable; it was further said that the judge omitted to point out to the jury that if they believed Mrs. Seddon's evidence it went to establish the appellant's innocence no less than her own. It is necessary that we should make clear the logical effect of the verdict. Both prisoners were given in charge of the jury, Mrs. Seddon was found not guilty and the appellant guilty; that meant as to the appellant that he did, either by his own hand, or by the hand of another, administer arsenic fatally to Miss Barrow with the intent that she should die, and as to Mrs. Seddon that it was not proved that she administered the poison, or that, if she did, it was not proved that she did so knowing it was poison and intending to kill. It is a mistake to say that it means she had nothing to do with the affair; in this country there are no means

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of expressing in a verdict the difference between "innocent" and "not proved guilty." The fallacy is shewn in this case by this; it was insisted over and over again that the onus was on the Crown to prove the case; if so, the verdict as to the wife necessarily means that the case has not been proved, though it may mean more. When that is considered it is apparent that there is nothing illogical in acquitting the wife for want of proof and convicting the husband. There may be evidence against him which did not bear against her. Again, with regard to her being called as a witness on his behalf. She gave evidence, but we cannot say how much of it the jury believed; it does not follow that they believed it all; it is seldom that a witness with a strong interest tells the whole truth and nothing but the truth. So there is no logical dilemma in acquitting the wife and not the husband.

The next point taken is that the judge omitted to point out to the jury that the appellant's conduct after the death of Miss Barrow pointed to guilt of larceny only, and not to guilt of murder. If the judge had told the jury so it would have been a misdirection. It is untrue to say it only pointed to larceny; it was for the jury to say from all his actions what it was that the appellant wished to conceal; his omission to notify Miss Barrow's decease to the Vonderahes (for it is incredible that he really sent them a letter; the production of a copy is almost enough to make the jury disbelieve this); the fact that he did not publish the death in the papers; the hurried way in which the funeral was arranged, were all evidence that he desired to conceal the fact that Miss Barrow died of arsenic, and that he thought the sooner she was put out of the way the better. All this pointed far more to murder than to larceny.

There was no point of law here on which any wrong decision was given, so it only remains for us to deal with the main point raised, that the judge was wrong in ruling that there was evidence of murder to go to the jury. In our opinion there was ample evidence at that point. It is true that as the case proceeded the case for the prosecution was much strengthened by the cross-examination of the appellant, but the judge was right to leave the case to the jury. The case having been left fairly to them, the jury found him guilty. It must never be supposed that, because a particular point is not referred to by a judge, that point

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is not in the minds of the jury. It is true that there are points which it is desirable should have been within the consideration of the jury, and to which allusions cannot be found in the summing up, but we are satisfied that these points were not absent from the consideration of the jury. The jury must have had it in mind when Mrs. Seddon gave evidence that it was evidence to which they must have regard in deciding on their verdict in Seddon's case. She was called on behalf of Seddon, so this must have been impressed on the minds of the jury. If the judge did not mention it, it was because it was unnecessary to do so. The Court has no reason to think that the jury were wrong in coming to the conclusion they did come to. Then is there any ground for saying that the verdict was unreasonable? The Court cannot say so. The main point differentiating this case from certain other circumstantial cases of poisoning is that no poison was traced to the physical, manual possession of the appellant; it was traced to the house, but there is no evidence that it was put by Seddon into anything that Miss Barrow took. But absence of that evidence does not justify us in saying that the jury were unreasonable in giving the verdict they did. Beyond doubt Miss Barrow died of arsenical poisoning, and the appellant had a strong motive for killing her, as he had, by means which could not be described as commendable, become possessed of all her property, and had given her nothing of any value in return but the promise of an annuity at the rate of £1 a week. If this sum was above the market rate the motive was stronger than if it had been a purely business transaction. On these grounds, and on the grounds that his conduct on the night of the death was that of a man anticipating her death; that he did not do the natural thing, namely, go to fetch the doctor; that immediately after the death he was found looking for what money was left in her room; that three days before her death he made a will constituting himself executor, and therefore in control of her property; that he never notified the relatives of the death, and that he arranged the burial with extreme haste, and not in the natural way—for although he had in his possession a document which shewed that she had a right to be buried in a vault, yet he handed her over to a common grave and invited no one to the funeral; on all these grounds it may be said that the verdict was not unreasonable. There was no one of whom it was suggested by the defence that

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they might have poisoned Miss Barrow, and the suggestion that she committed suicide either purposely or accidentally has not been seriously contended, and is a hypothesis no jury would be likely to adopt. In all these circumstances, although no manual possession of the poison by appellant was shewn, the jury came to the conclusion that the case was proved. There was evidence on which they could legally and reasonably so find, and the Court does not desire to indicate that it would have come to any other conclusion. There is therefore no power for this Court to interfere with the verdict, and the appeal is dismissed.

Appeal dismissed.

Solicitor for the Appellant—*T. Walter Saint.*

A. L. B. T.

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JOHN NEWTON.

On proof that the jury in finding their verdict have considered matters which they ought not to have regarded the Court will quash the conviction.

This was an appeal against conviction by leave of Channell J. Appellant was convicted at the Central Criminal Court on the 8th March, 1912, of larceny, before Mr. Commissioner Rentoul, and was sentenced to twelve months' imprisonment with hard labour.

E. J. Purchase for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted with three other persons for the larceny of sixteen saddle-backs, and in a second count for receiving them well knowing them to have been stolen. Only the question of receiving was put to the jury although a general verdict was in fact returned. The first point is whether there was any possession of the stolen goods by the prisoner. He was seen by a police constable walking with Tone, one of the other prisoners. Tone was carrying the stolen property and the appellant was seen to try and take it from Tone, but Tone would not let him do so. Later, the appellant and Tone were seen coming from the house of a third prisoner, and the stolen

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property was ultimately found in a yard at the back of that house. These facts were accepted by the defence, and it was submitted that there was no case to go to the jury; the whole case for the prosecution rested on the doctrine of recent possession, which cannot be applied unless there is proof of possession either actual or constructive. *Wiley*, 2 Den. C. C. 37; T. & M. 367; 20 L. J. M. C. 4; 15 Jur. 134; 4 Cox C. C. 412 (1850), is authority for saying that companionship and guilty knowledge are not sufficient to justify a conviction for felonious receiving. See also *Hill*, 1 Den. C. C. 453; 3 New Sess. Cas. 348; T. & M. 150; 2 Car. & K. 978; 18 L. J. M. C. 199; 13 Jur. 545; 3 Cox C. C. 533 (1849); *Smith*, Dears. C. C. 494; 24 L. J. M. C. 135; 1 Jur. (N. S.) 575; 3 W. R. 484; 6 Cox C. C. 554 (1855); and *Coots*, 2 Cox C. C. 188 (1847).

Secondly, the jury, in arriving at a verdict, were not influenced by the evidence alone. During the trial one of the jurors said to the counsel for the appellant: "Your client has not called any evidence as to his previous character, and he has not gone into the box to say whether he knew the other prisoner." The judge said: "He is not bound to." On the next day the jury retired for some time and then returned a verdict of "guilty" against the appellant, upon which a juror said: "My Lord, the jury wish, if it is possible, for you to deal with the prisoners under the First Offenders Act. They will appreciate it." The judge then said: "One of your number was anxious yesterday, I think it was yourself, Mr. Foreman, to know the character of John Newton as a first offender. He has been convicted eighteen times. He has been sent to penal servitude several times, and altogether he is about one of the worst cases that has appeared in the Court during this session. You, of course, were not allowed to know that at all," whereupon the foreman answered: "My Lord, I might tell you I have only made use of this remark on purpose to get the jury to agree. I had my own suspicion, as I asked the counsel yesterday if he would bring any witnesses as to his previous behaviour." That amounted to such a defect in the trial as to amount to a miscarriage of justice.

W. B. Woodgate, for the Crown (who was called on only as regards the second point). The conclusions of the jury were quite spontaneous, and were not inspired by any remark from the bench

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or the bar. The foreman may have had his suspicions of the appellant's character, but it does not follow that he imparted them to the other jurymen. The Court should not indulge in hypothesis as to what happened when the jury discussed their verdict.

DARLING J.: In this case John Newton was convicted with another prisoner named Tone of feloniously receiving stolen goods. There is no evidence who stole the goods, but Tone was seen carrying a bag containing them; Newton was with him, and at one point put up his hand as if to take the bag, but Tone refused to let him have it. If Tone had been the thief and Newton had been charged with receiving that would not have been enough. There would have been no possession by Newton as opposed to possession by the thief. But here both were charged with receiving, and possession in a receiver may be actual or constructive; there was evidence here against both prisoners which it was proper to leave to a jury.

But the evidence against the appellant was very slight, and a very little might turn the scale against him. Now what happened here was this. (The learned judge read from the shorthand notes the passages quoted above.) We do not know how many of the jury were not in agreement; if one man is not convinced he ought to yield to argument, but he ought not to agree for a reason which has no reference to whether the prisoner is guilty or not on the evidence. The foreman said, "I had my own suspicion"; this means that he rightly suspected the appellant of being an old offender, and that because of that he was prepared to think that his association with Tone was strong evidence that Tone's possession of the goods was the appellant's possession also. Some of the jury did not suspect him of being an old offender, and judging on the evidence, might probably have acquitted him. Then it seems clear that the foreman thought that if he could elicit that the appellant was an old offender the jurymen would come round. This is plain from his remark; the appellant could not give evidence as to his character, and the judge had to interpose. Then the jury either came to the conclusion that he was an old offender, and therefore likely to be guilty, or said they would find him guilty and ask the judge to treat him under the First Offenders Act, in which case

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if he was not an old offender he would be bound over, and no harm would be done.

This has been brought to the notice of this Court; the evidence in the case was weak, and there is proof that the verdict was arrived at on the consideration by the jury of matters to which they ought not to have had regard. The Court therefore feels that the trial was unsatisfactory to such a degree that the appeal must be allowed, though in all probability the verdict was right, but was arrived at in a wrong way.

Conviction quashed.

A. L. B. T.

WILLIAM BAKER.

This was an appeal against conviction, by leave of Channell J. Appellant was convicted at the Central Criminal Court on the 20th March, 1912, of possessing a mould for coining, and was sentenced by the Recorder to eighteen months' imprisonment with hard labour.

Adrian Clark for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was indicted under s. 24 of the Coinage Offences Act, 1861, the opening words of which are, "Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall have in his custody or possession any mould," &c. He was not represented at the trial. In charging the appellant the Clerk of the Court, as appears from the shorthand note, left out the words "without lawful authority or excuse," and the appellant answered, "Yes, I am guilty of having them in my possession," on which a plea of guilty was entered. On being asked whether he had anything to say why judgment should not be passed upon him according to law, he said, for the first time, that he only used the moulds for making medals. This amounted to a defence, as it was a lawful excuse. (He was stopped by the Court.)

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R. Wilkinson for the Crown. The prisoner clearly understood the charge, and his answer was a good plea to the indictment.

DARLING J.. In this case the Court thinks that the appeal must be allowed in the form which I will indicate. The Court is of opinion that there was no plea of "Guilty," and as there was no trial it was impossible to pass sentence. What the prisoner said either amounted to a plea of "Not guilty" or else it was an unfinished, informal plea. All the appellant did was to admit that the mould was in his possession, and he never finished his plea, or, if it is to be collected from what he said afterwards, it was a plea of "Not guilty." As the case stands, there was no plea of "Guilty," and therefore the sentence was informal. The case must go back, and the prisoner must be asked to plead again to the indictment, and the case must then proceed. The prisoner is remanded in custody.

Appeal allowed (*a*).

A. L. B. T.

(*a*) The form was: "The Court . . . doth allow the said appeal, and doth order that the conviction and judgment be set aside and annulled. and that the appellant do appear at the next session of the Central Criminal Court and plead to and answer the said indictment, and that in the meantime the appellant be remanded in custody."

BEFORE

MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE PICKFORD, AND MR. JUSTICE AVORY.

MARY HEWITT.

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The pecuniary "amount" to which "damage" is done within s. 51 *of* 24 & 25 *Vict. c.* 97, *the Malicious Damage Act,* 1861, *is to be reckoned without deducting any salvage value.*

This was an application for leave to appeal against conviction. Applicant was convicted on the 27th March, 1912, at the County of London Sessions of committing malicious damage to an amount exceeding five pounds, and was sentenced by the Deputy-Chairman to four months' imprisonment.

G. R. Blanco White for the applicant, who was not present. This case arose out of the recent suffragist disturbances, and the damage was done to three windows of the post office in Church Place, which runs from Piccadilly to Jermyn Street. Two page boys gave evidence for the prosecution; one, Cullum, stated he was standing in the door of the post office, and saw the applicant break three windows with a hammer and go round the corner to Jermyn Street; the other, Smith, said he saw the applicant break one window and then go round the corner, and in cross-examination he said he saw her come from round the corner. The windows were valued at £3 6*s.*, £2 10*s.*, and £2 10*s.*, so if the applicant only broke one window she was entitled to an acquittal. Mr. Lawrie, in his summing up, said that in all probability Cullum was in a better position than Smith to see, because he was quite close to the post office, while Smith was behind him. There was no evidence at the trial as to the relative positions of the two boys, though there had been at the police court, so this was a misdirection. There had been many similar cases

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where the evidence was quite clear, so it was important that, in a case where there was some doubt, the discrepancies in the evidence of the two witnesses should be put clearly to the jury.

Since notice of appeal was given fresh evidence has been discovered by the defence, which I ask leave to call. The solicitor instructing me has been in communication with the Office of Works as to the cost of the renewal of the glass, and has ascertained that the net cost, after allowing for the value of the part of the glass which was not damaged, and which can be used for smaller windows, is £2 6*s*. for the larger window, and £2 for each of the smaller ones. I wish to call an official from the Board of Works to prove this. A man named Pawle is also prepared to state that he saw another person break one of the windows. If the applicant only broke two windows the damage done is under £5, since the measure of damage is the commercial value of the windows, and this can only be arrived at by a consideration of the commercial position of the owner, and his ability to claim salvage or obtain discount. Further, it is not necessary to replace the whole window; many post offices have windows made of two pieces of plate glass which overlap. It is true that Pawle's existence was known to the defence at the time of the trial, but not his address, nor did it appear that his evidence would assist the applicant until the small value of the windows was ascertained.

PICKFORD J.: In this case the applicant was convicted of doing malicious damage to property to an amount exceeding £5, and was sentenced to four months' imprisonment. Leave to appeal was refused by Darling J., and this is an appeal from that refusal. The appeal as it originally appeared on the papers was on the ground of misdirection and that the verdict was against the weight of the evidence. Three windows of a post office in Church Place were broken, and the chief evidence was given by a boy named Cullum, who says he was close to the post office, and saw the applicant break three windows. If that was so, no question arises on the point of damage; but another witness, named Smith, was in Church Place, though his position is not exactly defined, but it appears that he was not so near the windows as Cullum. He says he only saw one window broken, and he differs from Cullum as to the direction from which the

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applicant came. There were considerable discrepancies between the evidence of these two witnesses, but although Smith said he only saw the applicant break one window, he also said, "I didn't see all she did do." The Deputy-Chairman stated in his summing up that in all probability Cullum was nearer, and had a better opportunity for seeing, than Smith. That is said to be a misdirection, but we do not think it was. At the outside it was an intimation to the jury of the construction which he thought the evidence bore, and it is a construction which it will bear.

Then it is said that he did not point out the discrepancies in the evidence of Cullum and Smith. It seems to us that he did do so clearly, and that he left it to the jury whether the discrepancies were sufficient to make them doubt Cullum's story; they returned a verdict against the applicant, and therefore as the case was presented at the time there is no objection to the conviction.

Another point is urged to-day that the damage done did not exceed £5 if only two windows are taken into account, and it is said that a witness, Pawle, is prepared to say that the applicant did not break the third window. On the question of the damage being under £5, two suggestions are made; the first is that the whole window need not be replaced, but that a strip at the bottom could be cut out. This case ought to have been made at the trial if it was to be relied on by the defence; but, apart from that, we cannot say that, after breaking a window, a wrong-doer is entitled to say, "You must not have a whole window in future, but must have one made up of pieces." The other suggestion is this: it is said that information has been received from the Office of Works which shews that if salvage is taken into account the loss to the Post Office will not be £5 for any two windows. This seems to us a confusion in terms; s. 51 of the Malicious Damage Act says, "Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property . . . . the damage, injury, or spoil being to an amount exceeding five pounds, shall be guilty of a misdemeanour." If it be the fact, as was proved and found, that in order to put the damage right the windows must be taken out, which would cost £10, it is no answer to say that then the broken glass can be

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sold for a sum which would reduce the amount below £5. If that is correct Pawle's evidence is not very material; he only proves that one window was broken by someone else, and if any two are over £5 in value, that would not procure an acquittal. The matter of Pawle's evidence was known at the trial, although its exact effect was not apparent, but it was in fact cross-examined to. Where people know of the existence of a witness, but take no trouble to call him, and the fact turns out that on some point his evidence would be more material than originally appeared, that is not a reason for allowing that witness to be called on appeal. Pawle's evidence in any case is not material, so on none of these grounds can leave to appeal be given.

Application dismissed.

Solicitor for the Applicant—*C. H. Hicks.*

A. L. B. T.

MAUD JOACHIM.

If the "damage . . . . to an amount exceeding five pounds" be done by persons acting in concert, each is guilty within s. 51 *of* 24 *&* 25 *Vict. c.* 97, *the Malicious Damage Act,* 1861, *though individually he did not commit damage to that amount.*

This was an appeal against conviction on a point of law, and an application for leave to appeal against conviction on fact and against sentence. Appellant was convicted on the 28th March, 1912, at the County of London Sessions, of committing malicious damage to an amount exceeding five pounds, and was sentenced by the Deputy-Chairman to six months' imprisonment.

G. R. Blanco White for the appellant, who was not present. The appellant was indicted with Olive Fargus for breaking two windows at 74, Regent Street, and six windows at 76 and 78, Regent Street, the offences being committed in connection with the recent suffragist disturbances. Miss Fargus pleaded "guilty," the appellant "not guilty," and the charge against her as to 74, Regent Street was proceeded with. The evidence for the prosecution was to the effect that Miss Fargus broke a

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large window there, and then went on and broke the six windows at the next shop, when she was caught and taken into that shop. The appellant followed, coming from Air Street, broke a small window at No. 74, which was valued at £3; she was then arrested and taken into No. 76, where Miss Fargus already was; this all happened within two minutes. The appellant gave evidence and stated that she only knew Miss Fargus slightly, had no idea that she intended to break windows, and had not seen her before on that day. In cross-examination she admitted that she belonged to an association to which Miss Fargus also belonged, but she refused to answer the question whether she had been invited by the association or anyone to break windows on 1st March, although the Deputy-Chairman ruled that the question was admissible. I admit that this refusal must be taken for the purposes of this appeal to be an admission that she had been so invited, but even if she and Miss Fargus were sent out by the same organization, I submit that this is not sufficient to justify a conviction; the actual fact that they were acting in concert should have been proved. Although there was evidence on which the jury could infer they were acting in concert, this evidence was very weak, and it is clear from the summing up that the appellant's denial of any knowledge of Miss Fargus' actions was accepted as true. Further, there was no evidence that Miss Fargus was sent out by any organization, nor that she and the appellant broke the windows by similar methods.

The sentence was too severe; if the prosecution had known that the appellant was not actually acting in concert with Miss Fargus the case would have been dealt with at the police court, where the maximum sentence was two months' imprisonment. On the evidence that they were all sent out by one organization, every case that was disposed of at the police court might have been sent for trial, but the appellant has been fortuitously selected for different treatment to that of the others who did damage under £5.

Roland Oliver, for the Crown, was not called upon.

LAWRENCE J.: In this case the appellant was convicted under the statute of committing wilful damage to property to an amount

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exceeding £5, and the appeal has taken this course. Counsel has argued that the appellant is not liable because the window which she broke was a small window, the value of which was not more than £3. Larger windows were broken by Miss Fargus of a value of over £7. The contention is that the appellant is not liable to be convicted because she said in her evidence that she did not know Miss Fargus had broken any windows until after she herself had broken one. Counsel admits that there was evidence to go to the jury that the two ladies were acting in concert and out for the purpose of breaking windows, but he says that unless it is shewn that each of them knew that the other was breaking windows they are not to be held liable as acting in concert. We think it was a question for the jury whether on all the evidence they were acting in concert, and the jury was entitled to take all the facts into consideration. It is not necessary that each should have known the acts of the other if in fact they were both acting under the direction or suggestion of a person whose orders they took, knowing that others were doing the same. They are equally guilty although they had no knowledge of each other's actions or existence. The point of law, therefore, is not well founded.

As to the sentence, I do not think we can make any reduction. On the view we take of the law she was guilty of the offence by joint action. The case was fairly put to the jury, who did not take the view of the defence, and there is nothing in the case to render it right that we should reduce the sentence. The previous convictions recorded against the appellant make it clear that the sentence was a proper one.

Appeal dismissed.

Solicitors for the Appellant—*Hatchett Jones, Bisgood & Marshall.*

A. L. B. T.

ALFRED CHARLES GREEN.

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Severity of sentence may be determined by the prevalence of a particular form of crime in a particular neighbourhood.

This was an appeal against conviction on a point of law (Summary List), and an application for leave to appeal against conviction and sentence, and to call further evidence. Only the application for leave to appeal against sentence is material for the purposes of this report. Appellant was convicted on March 9th, 1912, at the Birmingham City Sessions, of unlawful wounding, and was sentenced by the Recorder to five years' penal servitude.

D. Cotes-Preedy for the appellant, who was not present. The facts as alleged on behalf of the prosecution in this case were that the appellant met a girl named Ruby Dawson, with whom he was living, in the street; there were words between them which ended, according to her story, with his stabbing her with a knife. The wound was not serious, and according to the appellant, was caused by a broken flower-pot in a scuffle which occurred after they had returned to the house. For this offence the sentence was too severe; he had never been convicted of a crime of violence before, his only previous sentences having been three months' imprisonment for keeping a brothel, and one month's for larceny.

Avory J.: In this case one of the grounds on which we are asked to give leave to appeal is that the sentence was excessive. At first sight, undoubtedly, a sentence of five years' penal servitude passed on a man who had only two previous convictions, for the more serious of which he was sentenced to three months' imprisonment for keeping a brothel, seems severe; but we have to take into consideration the special reason which the Recorder gave for passing a severe sentence, apart from the question of the appellant's character. Crimes of this character, where the knife had been used, had been frequent in Birmingham, and the Recorder said he had given warning that he would inflict

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severe sentences to put down the use of the knife. The Court is of the opinion that the prevalence of a particular form of crime in a particular neighbourhood may require such an offence to be dealt with by a severe sentence.

Application dismissed.

Solicitor for the Appellant—*A. J. Glover*, Wednesbury.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD, AND MR. JUSTICE AVORY.

JOHN MARTIN. 1912 29 *April.*

On the trial of an allegation of being a habitual criminal, it is a question for the jury whether the evidence of the prisoner's having worked honestly and tried to get work since his last release from prison is sufficient.

This was an appeal against conviction as a habitual criminal by leave of the full Court. (See above, p. 196.)

Appellant was convicted on the 5th March, 1912, at the County of London Sessions, of counting-house breaking, and stealing and receiving, and of being a habitual criminal, and was sentenced by the Deputy-Chairman to three years' penal servitude and five years' preventive detention.

C. B. M. Hodgson, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant in this case is a married man aged thirty-eight, and he has two children. He has been seven times previously convicted, and the three convictions proved under the Prevention of Crime Act, 1908, were four years' penal servitude in 1902 for counting-house breaking, three-and-a-half years' penal servitude and two years' police supervision in 1906 for warehouse breaking, and twelve months' imprisonment for warehouse breaking in 1910. He was released from that sentence on 15th July, 1911, and at once registered himself at the Labour Bureau in Walham Green, and almost immediately got work with a large firm of builders, where he earned high wages as a carpenter. He was there from the last week in July until the middle of August, when the work was finished. He then registered again, and was found work at Kensington, where he worked altogether for five weeks, frequently earning extra money for overtime; the job was finished on the

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30th September, and he again went to the Labour Bureau; registration lasts for a week, and he registered himself on the 2nd, 9th and 17th October, after which he says he was told there that work in his trade was slack, and he had better look for work elsewhere. Since leaving prison he had earned 25*l.*, and he lived on that and on 1*l.* which he earned by doing a few odd jobs. His wife earned a little as a waitress, and he bought a trestle bench with the object of doing work at home. By December his money was exhausted, and he pawned his clothes, and finally his tools. The fact that he kept them to the last shows his desire to lead an honest life, but this was not put to the jury. The two offences to which he had pleaded guilty were committed on the 9th and 12th February, 1912.

The notice served on the prisoner under s. 10 (4) of the Prevention of Crime Act, 1908, gave the following, in addition to the three convictions, as the grounds on which it was intended to found the charge of being a habitual criminal: "That after your last release from prison on the 15th July, 1911, you made no genuine effort to give up your criminal and dishonest life, and although you worked for two short periods for responsible masters, and earned high wages during the months of August and September, 1911, this was only done, as you yourself stated to Police Constable Baker, with the object of not becoming amenable to the penalties imposed upon habitual criminals by the Prevention of Crime Act, 1908." The first part of this statement is not, I submit, borne out by the facts. As to the second part, Baker gives evidence that the appellant said to him that he was practically "broke," and would soon have to start "on the run" again, adding, "If I start on the run again and they capture me, they cannot do me as a habitual criminal as I have been at work." This was a true statement, and there is no suggestion that he had worked merely to evade the Act. Detective Dodd, who was present at the time, stated that the appellant gave him to understand that he had done the work purposely to evade the Act, but could not quote the exact words.

The summing-up, though satisfactory as regards the law, omitted any reference to the facts which told in the prisoner's favour. The Crown failed to prove that the appellant was persistently leading a dishonest or criminal life. Apart from the unlikelihood of his having made any such statement to the

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detectives, the notice had specified Baker, and not Dodd, and had therefore not been proved. The detectives had in addition given inadmissible evidence as to his resorting with other criminals, and on the authority of *Fawcett*, 74 J. P. 444; 5 Cr. App. R. 115 (1910); and *Moran*, 75 J. P. 110; 5 Cr. App. R. 219 (1910), the conviction should be quashed.

Beaumont Morice, for the Crown. The crimes committed in February were of the same nature as those he had been convicted of before. No real attempt was made by the appellant to get work after the 17th October; as to the trestle bench which he bought, the police said that, owing to its size, he could not have put it up in his room; the wood was new and not planed. (He was stopped by the Court.)

Hodgson: The appellant's wife gave evidence that he had worked at the bench.

The LORD CHIEF JUSTICE: The appellant in this case appeals against his conviction as a habitual criminal. With regard to the sentence for the offences to which he pleaded guilty no one could suggest, seeing his record, and the nature of the offences, that it was too heavy, and therefore the only point to be considered is whether there has been any miscarriage of justice or ground for interfering with the verdict of the jury. The Court agrees that it is a case in which the jury might have acquitted the appellant of being a habitual criminal; they might have thought that the evidence was not sufficient to satisfy them that he was persistently leading a dishonest or criminal life. Dealing with the particular grounds urged upon us, we cannot say there was no evidence to justify the conviction. The view we are asked to accept of what the appellant said to the detectives is that, having done honest work, he could not be found a habitual criminal; another view, which is that stated in the notice, is that he only worked with the object of evading the operation of the Act. This point was properly left to the jury, and everything was fairly put that could be put in the prisoner's favour; the case having been properly left to the jury it is no answer that he worked honestly and tried to get work; this is only evidence on which the jury might have found that the

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charge was not made out. The jury had before them the fact that the three convictions proved were all for warehouse or counting-house breaking; also that in 1899 there had been another conviction for shop-breaking, and that he had just pleaded guilty to two offences of the same nature. The jury were cautioned against the detective's evidence, and in the circumstances, it seems to us that they may have taken the view that, while he worked honestly when he could get work, when he could not, he reverted to crime. There is the further fact that the account of what he did to get work after the 17th October is not very satisfactory. In our view there was evidence on which the jury could find him a habitual criminal, and there does not appear to be any substantial ground to justify the Court in interfering with their finding.

Appeal dismissed.

A. L. B. T.

ALFRED MAXFIELD.

If association with criminals is one of the "grounds" within s. 10 (2) (*b*) *of* 8 *Edw.* 7, *c.* 59, *the Prevention of Crime Act*, 1908, *notice thereof must be given to the defendant under the sub-section.*

This was an appeal against conviction as a habitual criminal by leave of Channell J. Appellant was convicted on the 19th March, 1912, at the Birmingham Assizes, before Hamilton J., of possessing a mould for coining, and of being a habitual criminal, and was sentenced to five years' penal servitude, and seven years' preventive detention.

Disney, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The grounds of appeal in this case are that evidence was improperly admitted, and that in the summing-up this evidence was the chief point left to the jury. It is true that this is not mentioned in the notice of appeal, but this was drawn up by the appellant, who was undefended at the trial, and the Court is asked, if necessary, for leave to amend the notice. In the notice specifying the grounds on which it was intended to found the charge of being a habitual criminal reference was only made

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to the previous convictions, and the fact that they and the present charge were all in connection with coinage offences; evidence was, however, given by a detective that he had on three occasions in November last seen him in company with a man named Barley; Barley had on that very morning been convicted by the same jury of being in possession of coining implements. This evidence should not have been admitted as no notice had been given of an intention to put forward association with criminals as a ground on which to found the charge, and it follows that the conviction should be quahsed. See *Turner*, [1910] 1 K. B. 346; 79 L. J. K. B. 176; 3 Cr. App. R. 103; 102 L. T. 367; 74 J. P. 81; 54 S. J. 164; 26 T. L. R. 162 (1909); *Waller*, [1910] 1 K. B. 364; 79 L. J. K. B. 184; 3 Cr. App. R. 213; 102 L. T. 400; 74 J. P. 81; 54 S. J. 164; 26 T. L. R. 142 (1909); *Fawcett*, 5 Cr. App. R. 115; 74 J. P. 444 (1910); and *Moran*, 5 Cr. App. R. 219; 75 J. P. 110 (1910).

The judge dealt with this evidence in the middle of his summing-up, and said that it did not amount to very much; but he returned to it at the end of his summing-up and said: "You are entitled to say that a man who has got a dishonest living in the past by passing counterfeit coin,—now having come down from honest wage-earning to hawking, let us hope also honest,—has according to the evidence been seen in November, 1911, about with one Barley, who is convicted at these assizes of a similar offence to that to which the prisoner has pleaded guilty in 1912. You are entitled to ask, does that shew that just before the offence in question he was again leading persistently a dishonest or criminal life?" There had been an interval of twenty months since the appellant's last release from prison, in which time he had done at least four months' honest work, but the evidence of this must have been entirely nullified by the evidence of association with Barley.

Costello, for the Crown. The ground on which the prosecution relied was that the offences were all of a similar character: see *Heard*, 7 Cr. App. R. 80; 28 T. L. R. 154 (1911), and the evidence of repute was given in support of this point. The judge in his summing-up pointed out that this evidence was not of much importance, and that the main point was the similar character of the offences.

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PICKFORD J.: This is an appeal against a conviction as a habitual criminal on the ground that evidence was admitted to shew that the appellant was a habitual criminal which was not referred to in the notice given him as required by the statute. The evidence was that he had been seen during the time that had elapsed since his last conviction with a man who had been convicted at the same assizes of a coining offence, which was the class of offence to which the appellant was particularly addicted. No notice of any intention to call such evidence had been served on the prisoner. That the evidence was considered important there is no doubt; it was only admitted by the judge after a discussion of some length as to whether it was admissible; the argument turned on another point, and it is unfortunate that the attention of the judge was not called to the fact that it was not in the notice. The judge gave his ruling, and then the detective was asked, "Can you tell the jury of your own knowledge whether this man has been associating with criminals?" and he answered, "Yes, I cannot give the dates, but I have seen him in company with a man named Barley," and he then identified Barley as the man who had been convicted that morning of being in possession of coining implements. This was not strictly evidence of repute, but it was evidence of a fact which it was very material for the jury to consider, and the more material as the interval since the appellant's last release from prison was considerable, and he had been at work during the time. When first mentioned by the judge in his summing-up he said the evidence was not very important, but in his last sentence he treated is as material. (The learned judge read from the shorthand notes the passage quoted above.) The cases of *Fawcett* and *Moran* shew that the evidence was inadmissible, because it was not referred to in the notice; therefore we cannot say either that it was not inadmissible or not of importance; probably it largely influenced the jury in coming to their decision. If the attention of the judge had been directed to the fact that it was not in the notice, he would no doubt have excluded the evidence. The conviction for being a habitual criminal must therefore be quashed.

Conviction as habitual criminal quashed.

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JAMES LAWRENCE CASTIGLIONE AND ROBERT GEORGE PORTEOUS.

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Corruptly swearing a false affidavit in an action brought by the plaintiff in a fictitious name against a fictitious defendant constituted perjury within s. 7 (repealed) of 52 Vict. c. 10, the Commissioners for Oaths Act, 1889, and is (semble) *perjury in a "judicial proceeding."*

Case stated. Porteous pleaded guilty, as did Castiglione on the 4th March, 1912 after a three days' hearing, at the Central Criminal Court, before Mr. Commissioner Lumley Smith, to charges of perjury. Sentence was postponed, and the appellants granted bail.

The offences were committed before the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6), came into force (on Jan. 1, 1912).

George Elliott, K.C. (with him *Curtis Bennett*), for the appellant Castiglione, who was present. The facts are clearly stated in the case. The indictment contained four counts; the first charged appellants with conspiracy to commit perjury in swearing false affidavits of service of writs of summons upon fictitious defendants in actions in the High Court for the recovery of the price of goods pretended to have been sold and delivered to fictitious persons; the other three counts charged Porteous, who was a solicitor, with committing perjury as to the service of writs of summons in three specific cases, and Castiglione with aiding and abetting and suborning Porteous to commit the perjury charged. The admitted facts were that writs were issued by Castiglione in the name of James Clark against fictitious defendants; Porteous swore affidavits before a commissioner for oaths that he had personally served the defendants. Castiglione then, on the strength of the affidavits, signed judgment in default of appearance as plaintiff in person, and obtained *praecipes* to the sheriffs of various counties against the fictitious defendants. The next step was that Castiglione sent a crate of pictures to a railway station in the country consigned to one of the fictitious defendants, and instructed the sheriff to seize the pictures under a *fi. fa.* The pictures, with others included in the sale by arrangement with the auctioneer, were sold by auction as "being part of the stock-in-trade of a picture-dealer seized by the sheriff." Casti-

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glione, as James Clark, received from the sheriff the amount of the execution, and from the auctioneer the other proceeds of the sale. No charge of defrauding the public was suggested. Evidence was given of some thirty such actions, in one of which the affidavit of service was sworn by Castiglione, in the others by Porteous. I took the point at the trial that the facts disclosed did not constitute perjury as there was no judicial proceeding, no real cause or parties or issue; that no defendant was served or could be served; and that no fraud against any party existed. The judge expressed the opinion that the issue of a writ was the commencement of a judicial proceeding for the purpose of obtaining a judgment, and that the affidavit of service was material for that purpose, and that the fact that the nominal defendant was a non-existent person did not prevent the swearing of a false affidavit of service from being perjury; but he said that owing to its novelty it was a reasonable case for the opinion of the Court of Criminal Appeal. As the case of Porteous involved the same point he thought it right to treat him in the same manner as Castiglione.

There was no real cause in which these affidavits were sworn, and therefore on the authority of *Pearce*, 3 B. & S. 531; 32 L. J. M. C. 75; 9 Jur. (N. S.) 647; 7 L. T. 597; 11 W. R. 235; 9 Cox, C. C. 258 (1863), a conviction cannot be supported. The Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 100, defines "cause," "plaintiff," and "defendant," and there was not in any of these cases a cause, plaintiff or defendant within these definitions. The case of *William Ewington*, 2 M. C. C. 223; Car. & M. 319 (1841), shews that where a Court has in fact no jurisdiction statements on oath made before it cannot be perjury.

Nor was it perjury within s. 7 [repealed by the Perjury Act, 1911, 1 & 2 Geo. 5, c. 6] of the Commissioners for Oaths Act, 1889, 52 Vict. c. 10, since, to constitute perjury, the false oath must be taken in the same circumstances as in a judicial proceeding, and the same principles apply.

Porteous, in person. I have nothing to add.

AVORY J.: The contention on behalf of the appellants may be concisely stated in this way; it is said that although they have sworn falsely in affidavits matters which they knew to be false,

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it was not perjury, because the affidavits were sworn in matters which were not judicial proceedings, by reason of the fact that the defendants were not real persons. To this there are two answers: first, the Commissioners for Oaths Act, 1889, s. 7, provides that "Whoever wilfully and corruptly swears falsely in any oath or affidavit taken or made in accordance with this Act shall be guilty of perjury in every case where, if he had so sworn in a judicial proceeding before a Court of competent jurisdiction, he would be guilty of perjury." In the opinion of the Court it is not necessary to decide whether these fictitious claims against fictitious defendants constituted judicial proceedings, because there is no doubt that the appellants swore falsely within the terms of this section. It is clear that the appellants swore falsely in affidavits taken in accordance with the Act before a commissioner for oaths, and that if the same oath had been taken in judicial proceedings they would have been guilty of perjury.

Apart from the section the authorities quoted do not go the length of deciding that these proceedings were not judicial proceedings for the purpose of founding a charge of perjury. They were commenced by writs, which is the ordinary commencement of judicial proceedings, followed, as a result of the false affidavits, by judgments issued by the Court, on which judgment the sheriffs of the different counties were put in motion, and on which they acted. These facts may be sufficient to shew that the proceedings were judicial so as to found proceedings for perjury; *Proud,* L. R. 1 C. C. R. 71; 36 L. J. M. C. 62; 16 L. T. 364; 18 W. R. 796; 10 Cox C. C. (1867). The appeal therefore fails. The appellants will be released on bail to surrender themselves at the Central Criminal Court for sentence.

Appeal dismissed.

Solicitor for the Appellant Castiglione—*A. W. Osmond.*

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JOHN JOSEPH HEMMING.

Severity of sentence.

Whether in s. 10 *of* 7 *&* 8 *Geo.* 4, *c.* 28, "*subsequent offence*" *means an offence committed subsequently, or one for which the offender was tried subsequently,* quære.

This was an appeal against sentence by leave of Channell J. Appellant was convicted at the Birmingham City Sessions on the 4th March, 1912, before the Assistant-Recorder, of larceny, and was sentenced to three years' penal servitude and two years' police supervision. The offence was committed on February 20th, 1911, and the appellant having been committed for trial was granted bail, and absconded. After absconding the appellant obtained money by false pretences, for which he was convicted at the Northampton Sessions on January 4th last, and sentenced to twelve months' imprisonment with hard labour. The Assistant-Recorder ordered that the sentence of penal servitude should run from the expiration of the sentence of the twelve months' imprisonment.

Appellant in person. The sentences should run concurrently. The Assistant-Recorder wished to make them do so, but was told by the counsel for the Crown that he had no power to make such an order.

F. W. Sherwood, for the Crown. If the Court leans to the opinion that the sentence was too severe, I am instructed not to argue against its reduction. But on the question of its legality I am prepared to argue. When the appellant came up for sentence, the Assistant-Recorder, no doubt, wished to pass a sentence to run concurrently with the sentence passed at Northampton, and I was of opinion then that he could do so. But the Assistant-Recorder afterwards doubted, and I then felt it my duty to call his attention to a *dictum* at p. 247 of Archbold's Criminal Pleading and Practice (24th ed., 1910), which reads: "But in the case of an independent subsequent offence it is doubtful whether the Court can impose a sentence to run concurrently with a prior current sentence, and in such cases the proper course seems to be to make the sentence for the subsequent offence (whether a substantial or nominal sentence) consecutive on the

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prior current sentence. *Woolley*, 3 Cr. App. R. 57 (1909)." It was on the strength of that dictum that the consecutive sentence was passed. Statutory power was expressly given by 7 & 8 Geo. 4, c. 28, s. 10, for the passing of consecutive sentences in these words: "Whenever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the Court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced. . . . ." One effect of this enactment was to place felonies in this regard in the position in which misdemeanours had always been at common law. In the case of *Wilkes*, 19 State Trials, 1131-1135 (1763-1770), the whole subject was discussed in the course of the answers given by Chief Justice Sir John Eardley Wilmot on behalf of himself and his brother Judges to the House of Lords. In the third answer it was said "that a judgment of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law." In the reasons given by the Judges it was said: "We cannot explore any mode of sentencing a man to imprisonment, who is imprisoned already, but by tacking one imprisonment to the other, as is done in the present case" (p. 1134). The language was most general and the principle stated arose from the nature of things; the sole reason of its being then applicable to misdemeanours only was that a man already under sentence for a felony could always plead to a subsequent indictment the plea of *autrefois attaint*, which operated as a bar to any further proceeding until the attainder were reversed: see Chitty, Criminal Law, 1826, I., p. 464; "any second attainder would be superfluous": see also *Wilkes*, at p. 1133; Stephen, Digest Criminal Law, 6th ed., 1904, p. 19, s. 24, footnote. But by s. 4 of the statute cited, 7 & 8 Geo. 4, c. 28, the plea of *autrefois attaint* was abolished. Felonies were thereby placed in the same category with misdemeanours, and the general principle applied. The following section 10 was, in my submission, not needed to give power to pass this sentence, and was perhaps in all cases superfluous; indeed, it has been spoken of as, perhaps, merely declaratory by Brett L.J., in *Castro*, 5 Q. B. D. 490, at pp. 515, 516: 49 L. J. Q. B. 759 (1880). The difficulty here is that

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the words "subsequent offence" need to be interpreted as meaning not subsequent in time, so far as the actual deed was concerned, for the crime at Birmingham was earlier in time to the crime dealt with at Northampton; the draftsman would have used more apt words had he written "distinct offence," the very words used in Chitty, Criminal Law, Vol. I., p. 792, published the next year (1826) before the passing of the statute (1827). Unless the section were so read some crimes might go unpunished, or, at all events, trials for them might have to be indefinitely postponed. On the now well-settled rules for interpreting statutes, including matters affecting criminal law, the words "subsequent offence" must be interpreted in such a way as to give effect to the true meaning of the statute.

[The Court stated that they were of opinion that the sentence was too severe. The legal question raised in the argument might have to be decided some day, and then it would be desirable to have it argued by counsel on both sides.]

AVORY J.: In this case the appellant committed the crime of larceny of a bicycle, for which he has been convicted on the 20th February, 1911; he was committed for trial, granted bail, and failed to appear at the Quarter Sessions. He was subsequently taken into custody and charged with obtaining money by false pretences, and on the 4th January, 1912, he was convicted of that offence and sentenced to twelve months' imprisonment with hard labour. On the 4th March, 1912, he was brought up for trial at Birmingham on the charge of stealing the bicycle in 1911; he was convicted, and the Assistant-Recorder having had the point argued before him whether he had power to award a sentence concurrent with or consecutive to that which the appellant was then undergoing, finally decided to pass a sentence of three years' penal servitude to commence at the expiration of his present imprisonment. It appears that he was influenced by the consideration, which has more than once been brought before this Court, of the undesirability of imposing sentences of imprisonment and penal servitude to run concurrently.

The Court, without deciding the question, which has been raised before it under 7 & 8 Geo. IV. c. 28, whether "subsequent offence" really means an offence committed subsequently or one

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for which the man has subsequently been tried, has come to the conclusion that the sentence was excessive, having regard to the appellant's age, and the other circumstances of the case. We think that the proper sentence for the offence of stealing the bicycle is one of twenty-one months' imprisonment with hard labour, to run concurrently with the sentence of twelve months' imprisonment. The result will be that he will be imprisoned for an additional nine months. We do not interfere with the sentence of police supervision which is to follow the imprisonment.

Sentence reduced.

A. L. B. T.

BEFORE

MR. JUSTICE BRAY, MR. JUSTICE PICKFORD, AND MR. JUSTICE AVORY.

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GEORGE RIMES.

Where there is a doubt whether certain material evidence was given the Court will, as a rule, decide the question by reference to the official shorthand note (especially where that is confirmed by the judge's note).

This was an appeal against conviction by leave of Lawrence J. and an application for leave to call further evidence. Appellant was convicted on the 10th April, 1912, at the Devonshire Sessions, of larceny, and was sentenced to nine months' imprisonment with hard labour.

W. L. L. Bell, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of stealing three fowls, the property of a farmer named Irish; but there was really no evidence that any fowls were missing. Irish only said that he went to the poultry-yard three days after the alleged theft and thought there were not so many there as there should have been, but he could not specify any number; the only evidence of identity given was that they were of the same breed as those belonging to Irish. In his summing up the Deputy-Chairman said that Irish had recently let his fowls pick up black oats and that such oats were found in the crops of the stolen fowls. No evidence of the latter fact appears on the shorthand note of the trial, but it may have been on the depositions. The appellant gave evidence that he bought the fowls from a man named Johnson, and he now wishes to call the owner of the fowls, one Stidstone, from whom Johnson stole them.

Vosper, for the Crown. My recollection is perfectly clear that

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a witness Moore gave evidence that black oats were found in the fowls' crops, but I cannot rely on this as it does not appear in the shorthand notes. I agree that the evidence of Irish as to missing the fowls at all was extremely unsatisfactory. The Deputy-Chairman was putting questions to Moore at the same time as myself, which may account for the omission. Even if the fowls were not the property of Irish but of Stidstone, the Court can affirm the conviction under s. 4 (1) of the Criminal Appeal Act.

PICKFORD J.: In this case the appellant was convicted of the larceny of three fowls, the property of a Mr. Irish. His defence was apparently—though it did not appear at first, and never appeared very clearly at the trial; but it seems to have been that he bought the fowls from Johnson, who stole them, not from Irish, but from Stidstone. The defence is not a very meritorious one, but if true it entitles the appellant to an acquittal. The evidence of identification of the fowls was very slight with one exception, and the evidence that the fowls were missed by Irish very vague. What was put to the jury as really conclusive was that at about that time Irish fed the fowls on black oats instead of as usual on barley, and that when their crops were examined black oats were found in them. That matter would have been of importance, and evidence to that effect had been given at the police court and appears on the depositions. The shorthand note contains, however, no evidence of that description as having been given before the jury which convicted the appellant. The Deputy-Chairman has informed us that there is no reference to any such evidence on his own notes, though he is under the impression that it was given, and Mr. Vosper also is under that impression. It was certainly an important matter, and as it does not seem certain that the evidence was given, we think it is important that, unless there are grave reasons for departing from the usual practice, we should be guided by the shorthand note, especially as it agrees with the Deputy-Chairman's note. We do not think the conviction satisfactory, and on the ground that considerable stress was laid on evidence which it is not certain was ever given, the appeal must be allowed.

Conviction quashed.

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Where on the trial of a charge of larceny the only evidence against the defendant is that of the person who receives the stolen property, and there is a suspicion that he knew that the property was stolen, his evidence must not be left to the jury as that of an untainted witness, but they should be warned that if they think that he was an accomplice there ought to be corroboration of his story.

This was an appeal against conviction and sentence by leave of the full Court. Appellant was convicted on the 1st April, 1912, at the Leeds City Sessions, of larceny, and was sentenced to seven months' imprisonment with hard labour.

Macaskie, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of stealing 28 lbs of lead and three brass taps from 30, Norwood Grove, Leeds, and the only evidence identifying him with the theft was given by Fred Lamport. Lamport stated that he met the appellant at the bottom of Roundhay Road on the 13th March, each having a horse and cart; that the appellant, who was a stranger to him, offered him some lead for sale, which he bought, and arranged to meet Jennings at the same place on the following day, when he bought further lead from him. Both these lots of lead Lamport at once sold to a firm of lead merchants called Heaps. On the 16th March Jennings came to Lamport's shop and sold him lead, and again on the 18th, when, information having been given to the police, Jennings was arrested. Lamport acted as manager for his mother, who was a licensed broker, and as such it was his statutory duty to enter all purchases of lead. A detective called at his shop on the 15th March, and no entry of the purchases from Jennings on the 13th or 14th had then been made. Jennings admitted that he sold small amounts of lead to Lamport on the 13th, 16th, and 18th March, but said that all the transactions took place in the shop. The detective confirmed his statement that he was never known to have had a horse and cart. The lead bought by Heaps was shewn by them to the police, who had an arrangement with them to examine any lead brought by Lamport; this shews he was regarded as suspect. The lead was proved to be that stolen from Norwood Grove, but this was not

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corroboration of the statement that it was stolen by Jennings. All the circumstances pointed to the fact that Lamport was an accomplice, and therefore his evidence required corroboration, and the Recorder should have directed the jury to this effect. There were the further facts that although Jennings was alleged to have given different names on the 13th and 16th of March when he came to Lamport's shop, Lamport admitted that he made no enquiries about him, and, further, that he never weighed the lead which he said he bought from appellant in the street on March 13 and 14. The appellant gave a circumstantial account of his movements on the 13th and 14th of March, but called no witnesses on the point; this was not surprising, as he was only a tout for furniture removals. Twenty keys were found in his kitchen, which he said he found in houses from which he removed furniture; one of them fitted 30, Norwood Grove, but this is not remarkable as it was a key of a very ordinary kind, so this fact could not be considered corroboration.

A. S. Comyns Carr, for the Crown. I cannot dispute that Lamport's evidence was of a tainted character, and that if he himself had been on his trial on the evidence given, and the same admissions had been made by him, there would have been a case to go to the jury; but even if direction that corroboration was required was desirable this Court will not necessarily interfere. The proposition is thus stated in Ross's Court of Criminal Appeal at p. 105: "When there is substantial corroboration, though no proper direction, the Court may use their power of dismissing the appeal on the ground that no substantial miscarriage of justice has actually occurred." There was here corroboration in the evidence given by the appellant; he admitted having sold lead to Lamport on three of the four dates suggested, there was also the fact of the key in his possession which fitted 30, Norwood Grove, and the unsatisfactory account given by the prisoner how he got it. Corroboration need not cover the whole of the accomplice's story, nor touch the actual piece of lead stolen; it is enough if it supports the general story told by the accomplice.

BRAY J.: In this case the appellant appeals against his conviction on a charge of larceny at Leeds City Sessions; the charge was of stealing, or feloniously receiving, certain lead. There is

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no doubt that certain piping was stolen from the house, but the question is whether the prisoner was in possession of the lead soon after the theft. The evidence in support of this suggestion was almost entirely that of Lamport; there was one other small piece of evidence; a number of keys were found in the appellant's house, one of which fitted the door of the house from which the lead was stolen. As the Recorder pointed out, this was a very small circumstance, and not much importance can be attached to it; it was an ordinary key, such as would naturally come into his possession in the course of his business as a furniture remover. Practically the case depended on Lamport. Lamport's story was that on the 13th March he met the appellant in Roundhay Road at a place nearly opposite a police station. Jennings came up in a pony-cart and said he had lead to sell; Lamport bought it, took it to Heaps, and arranged to meet Jennings the next day at the same place, when he bought more lead which he took to Heaps. The lead taken to Heaps corresponded with the stolen lead. Lamport's story was by no means corroborated in several instances; there were one or two discrepancies, and one or two points which throw a doubt on its accuracy. On the 14th March a detective came to Lamport's shop and asked to look at his book; this book should have contained entries of the purchases of lead, but there were none then, although they were put in afterwards. Lamport was questioned closely; he said he made no enquiries, although he did not know who the appellant was. We cannot doubt from Lamport's answers that there was a strong case that he knew the lead was stolen. The appellant's evidence contradicted Lamport as to there having been any sale in the street; he said he twice sold him lead in the shop, but there is nothing to shew that that lead was the same as that which was stolen. There is the further fact that on the second sale a different name was given by the appellant, which should have put Lamport on enquiry. All the circumstances lead one strongly to doubt the evidence of Lamport where it was contradicted by the appellant. The question was left to the jury whether they believed Lamport or the appellant; nothing was said as to the character of Lamport. It was put to the jury as if he were not a tainted witness or guilty of any wrong conduct. We think that the jury ought to have been warned that if they thought that Lamport bought the lead knowing that it was stolen, his evidence required corroboration.

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It is said that there was in fact corroboration; in our view there was none. The sale on the 16th was no corroboration of sales on the 13th and 14th. If the jury had been warned they would very probably have thought that Lamport bought the lead knowing it was stolen, and would have acquitted the prisoner. The appeal therefore must be allowed, but as there are two other indictments against the prisoner he must remain in custody, and the prosecution must consider whether they will go on with those indictments or not.

Conviction quashed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD, AND MR. JUSTICE AVORY.

JOHN HEATH.

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The direction as to a false pretence alleged must be precise.

This was an appeal against conviction and sentence by leave of the full Court. Appellant was convicted on the 9th April, 1912, at the Hampshire Quarter Sessions, of obtaining money by false pretences, and was sentenced to three years' penal servitude.

V. R. M. Gattie for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The false pretence alleged in this case was that the appellant was "then and there able to take photographs with the camera he had with him, and that for the sum of three shillings he would send to the prosecutrix prints of certain photographs which he then and there purported to take." These two pretences must stand together, and the second, being merely a promise, is bad. In any case, the camera could take photographs; some were actually found in the appellant's possession and were produced at the trial. He did not say he could take good photographs. (He was stopped by the Court.)

Temple Cooke, for the Crown. The photographs found on the prisoner a month after the offence had no connection with the subjects of these charges. The camera was old, out of repair, and could not take photographs, and the appellant practically admitted the charge and explained that the camera was out of repair. An expert gave evidence that the camera would not take a saleable photograph, and this was the issue left to the jury.

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Gattie. There were misdirections on questions of fact in the summing up, and no direction to the jury that there must be an intention to defraud, and that the pretence must be false to the knowledge of the prisoner.

AVORY J.: The appellant in this case was charged with obtaining money by false pretences. (The learned judge read from the indictment the words quoted above.) If the evidence had established that he had made the first of these false pretences, and had done so with intent to defraud, and had obtained money thereby, and if the jury had been properly directed on the point, the Court would not have interfered, whatever might be said as to the second false pretence which appears to deal with a future event. The Court is, however, of opinion that on the first alleged false pretence the real issue, that is, whether the appellant was able to take photographs with this camera, was never put to the jury. If the point had been properly put to them they might have found that the specimens were so bad as not to amount to photographs at all, but they were led to believe that the question was whether the camera would take saleable photographs, not whether it would take photographs at all. The Court is of opinion that there was no proper direction as to the real issue in the case, and therefore the conviction must be quashed; the prisoner must remain in custody, as there are two other indictments on which he can still be tried.

Conviction quashed.

A. L. B. T.

WALTER CHARLES EDWARD HAGREEN.

Severity of sentence.

On an appeal against sentence, the Court will satisfy itself that the appellant is (or was at the trial) willing that any other charges which may be pending should be dealt with.

This was an appeal against sentence by leave of the full Court. Appellant was convicted on the 11th April, 1912, at the Surrey Quarter Sessions, of obtaining goods by false pretences, and was sentenced to eighteen months' imprisonment with hard labour.

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Arthur Page for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant is just twenty-one years of age, and this is his first conviction, but the sentence was unduly influenced by evidence given by a detective.

G. T. Martin for the Crown. The detective's evidence had reference to other charges made against the appellant as to which the detective had made enquiries. It is not clear that the appellant was asked at the trial whether he wished these charges to be dealt with.

(The appellant was asked by the Court whether he wished to have the other charges against him taken into consideration, and replied in the affirmative.)

PICKFORD J.: In this case the appellant was convicted of obtaining goods by false pretences, and was sentenced to eighteen months' imprisonment with hard labour, although there was no previous conviction against him. *Primâ facie* this seems severe, but there are first offenders and first offenders. Here it should more properly be called "several first offences." There are several outstanding charges against the appellant, and no doubt his history, as given by the detective, was taken into consideration. If they were not taken into consideration the sentence would probably have been too severe, but the doubt on that point has to-day been remedied by asking the appellant whether he wishes the other charges to be taken into consideration. He desires that they should be, and in those circumstances there is no ground for interfering with the sentence.

Appeal dismissed.

A. L. B. T.

HENRY DAY.

Severity of sentence in the case of a first offence.

This was an appeal against sentence, by leave of the full Court. Appellant was convicted on the 13th April, 1912, at the Middlesex Sessions, of housebreaking, and was sentenced on the 16th April to twelve months' imprisonment with hard labour.

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HENRY DAY.

Lord Alverstone C.J.
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Roland Oliver for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant is only nineteen years old; I ask leave to call evidence as to character. (By leave of the Court three witnesses gave evidence as to the good character of the appellant. They had all employed him, and two of them had known him all his life.)

Four persons were concerned in the robbery, and it would appear from their antecedents that Maud Day, the appellant's sister, and a man named Jenkins, were the principals in the case. The appellant gave himself up to the police on the 8th March; his one idea seems to have been to screen the two women who were concerned in the robbery.

E. D. Purcell for the Crown.

The LORD CHIEF JUSTICE: In this case the appellant, who had not been previously convicted, was sentenced to twelve months' imprisonment with hard labour for housebreaking. The Chairman, in passing this sentence, may have been actuated by the prevalence of burglaries in the district. The prisoner had a good character and had done honest work, but he was tempted to break into the house by collusion with a person inside. The sentence was too severe for a first offence of this kind, and the Court is of opinion that the proper punishment would be six months' imprisonment with hard labour from the date of conviction.

Sentence reduced.

A. L. B. T.

ALFRED HILL.

When an issue at the trial is the identity of certain goods with those alleged to have been stolen, it is a grave misdirection to assume such identity.

This was an appeal against conviction and sentence, by leave of the full Court. Appellant was convicted at the Lancashire Quarter Sessions, holden at Preston on the 11th April, 1912, of feloniously receiving stolen property, and was sentenced to six months' imprisonment with hard labour.

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J. W. Ross Brown for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The charge against appellant related to copper wire, the property of the Postmaster-General, which was stolen on the 26th February. A police sergeant found some copper wire in the appellant's cart on the 28th March, and the main question raised at the trial was the identity of this wire with that which had been stolen; a witness for the prosecution admitted that the stolen wire was bright and in coils, whereas that which the appellant had was twisted and had been through the fire; a brass founder who was called for the defence stated that copper wire of the description of that which the appellant had was often offered in the market, especially after a snowstorm. Although the whole defence was as to the identity of the wire, there is no reference to this question in the summing up; the Chairman began by saying, "This wire was stolen on the night of the 26th February," thus assuming that the identification was clear.

Comyns Carr for the Crown. The summing up was not a full one. By agreement neither counsel addressed the jury, and it is possible that, as this trial took place during the coal strike, when the train service was considerably curtailed, this fact may account for the shortness of the summing up. The witness called for the defence admitted that the wire had at one time been Post Office wire. Further, there is nothing to shew that the alleged want of identity was the real point in dispute.

AVORY J.: In this case there was evidence before the jury that a large amount of copper wire belonging to the Postmaster-General had been stolen on the 26th February. There was evidence that shortly after the offence a police constable called on the prisoner and warned him not to buy copper wire of that description, and shewed him a sample. There was also evidence that on the 28th March the prisoner was found in possession of a quantity of copper wire in a cart which he was driving. We think it is clear that at the trial the identity of the wire in the cart with the stolen wire was disputed by the prisoner. It thus became the duty of the Chairman to ask the jury whether they were satisfied that the wire found in the prisoner's cart was stolen wire, and whether he knew that it had been stolen

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ALFRED HILL.

AVORY J.

when he received it, but the Chairman made no reference to the first point at all, and assumed that the wire was stolen wire. This Court can express no opinion as to the truth in this case, but the conviction must be quashed, as one of the questions in dispute was never left to the jury.

Conviction quashed.

A. L. B. T.

WILLIAM BAKER (*a*).

Evidence by a prisoner that he has been earning an honest living for a considerable time is "evidence of his good character" within sect. 1 (f) (ii) *of the Criminal Evidence Act*, 1898.

Whether, on an indictment for possessing a mould for making counterfeit coin, evidence is admissible of the uttering of a coin of another description and not made from that mould, quære.

Severity of sentence where there has been a re-trial.

This was an appeal against conviction on a point of law, and an application for leave to appeal against conviction on fact and against sentence. Appellant was convicted at the Central Criminal Court on the 24th April, 1912, of possessing a mould for making counterfeit sovereigns, and was sentenced by the Common Serjeant to three years' penal servitude.

Adrian Clark for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The ground of appeal in this case is that evidence of previous convictions and other matters was wrongly admitted. The prisoner said that he had been living an honest life for four years; this was true, as he had been earning a living by selling medals, haberdashery, &c., but it was not equivalent to saying that he was an honest man, and that his evidence should therefore receive as much attention as that of the prosecution—it was merely part of his defence to shew that he had been honestly making medals for the past four years, and this did not justify the prosecution in giving evidence of previous convictions. Further, evidence was improperly admitted of two

(*a*) See p. 218, above.

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cases of uttering counterfeit coin, with reference to which there are still indictments on the file. One of these cases dealt with the uttering of a gilded shilling as a sovereign a month earlier; the mould was capable of being used for making a counterfeit sovereign but not a shilling, so this evidence was not admissible to prove a guilty mind, though evidence of uttering the bad sovereign might have been admissible, as it might have been made in the mould.

As to sentence, the appellant was tried on the same charge in March and sentenced to eighteen months' imprisonment with hard labour. On appeal to this Court that sentence was set aside on the ground that he had never pleaded guilty to the charge, and it was ordered that he should be tried again on the same indictment. He raised the same defence as the Court thought he had intended to raise at the previous trial, but was sentenced to three years' penal servitude. This is too severe; he has only been convicted twice before, the last occasion being seven years ago, and neither of these convictions was for a coinage offence. Moreover, the Court should not impose a penalty on a successful appellant.

Robert Wilkinson, for the Crown, was not called upon.

PICKFORD J.: The appellant in this case was indicted for feloniously having in his possession a mould which could be used for making counterfeit coin. He was understood to plead guilty, and was sentenced by the Recorder to eighteen months' imprisonment with hard labour. On appeal it was said that he had not intended to plead guilty to the offence, but only to the possession of the mould, and on that ground this Court quashed the conviction, allowed a plea of "not guilty" to be entered, and the appellant was sent back to be tried on the indictment. He was tried and convicted, and was sentenced, instead of to eighteen months' imprisonment, to three years' penal servitude.

The first question is whether he was rightly convicted. Two objections are taken, the first of which is that evidence of previous convictions was wrongly admitted. He gave evidence that for four years he had been earning an honest living, and in our opinion this was evidence of good character, and that laid him open to cross-examination as to character. The next point is that evidence was admitted that he had passed a gilded shilling as a

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sovereign. It is not suggested that that coin was made in the mould, but it is by no means clear that evidence of passing counterfeit coins would not be admissible in such a case, although the coin did not come from the mould. It is not, however, necessary to decide that point, for the admission of the evidence did not, in our view, lead to any substantial miscarriage of justice. It is admitted that there was evidence on which the jury could convict, so there are no grounds on which the Court can interfere with the conviction.

As to sentence, although he had not been convicted previously of a coinage offence, he had twice been convicted of dishonesty, and the sentence passed for what is a serious offence can only be said to be too severe because it is more severe than that passed before. It not seldom happens that when a case is tried out the facts come out more distinctly than when it is settled by a plea of guilty, and this probably happened here. Looking at the case as it came out we do not think it is possible to say that the sentence is too severe.

Appeal dismissed.

A. L. B. T.

WILLIAM DAVIES.

Whether sentence can be antedated before the first day of the Assizes or the Sessions, quære.

A pending charge against a convicted prisoner ought not to be ignored in the sentence merely in order that information may be obtained from him concerning the alleged offence through fear of further proceedings.

This was an appeal against sentence, by leave of A. T. Lawrence J. Appellant was convicted at the Banbury Borough Sessions on the 22nd April, 1912, of obtaining money by false pretences, and was sentenced to four years' penal servitude, to run concurrently with, and to date from, a sentence of three years' penal servitude passed at the Chester Quarter Sessions on the 1st January, 1912.

Appellant was not present, and was not represented by counsel.

W. H. Ames for the Crown. Although other charges against the prisoner were taken into consideration in passing sentence

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in January, the police asked that this case should be excluded, as they did not know where the stolen property was. The sentence passed in April was ordered to run from the same date as that which the appellant was already serving; such a course was taken by the Court of Criminal Appeal in *McLean*, [1911] 1 K. B. 332; 80 L. J. K. B. 309; 103 L. T. 911; 75 J. P. 127; 22 Cox C. C. 362; 27 T. L. R. 138; 6 Cr. App. R. 26. Even if there is no power to do this no substantial injustice was done; the Recorder intended to increase the punishment, and the same result could have been arrived at in a different way.

The LORD CHIEF JUSTICE: The Court is not satisfied that it has the power of antedating a sentence to a day before the first day of the sessions or assizes, but it is not necessary to decide the point, as it may arise on some future occasion. In this case it does not seem to the Court that the appellant ought to undergo any longer sentence than that which he was already serving. He was tried in January at the Chester Quarter Sessions, and it is clear that he then desired all the charges outstanding against him to be taken into consideration, but it appears that the Recorder did not take this case into consideration, as he was asked not to do so by the prosecution. The Court does not approve of attempts being made to obtain further information from a prisoner by pressure of further proceedings. Eight other cases were taken into consideration, and it appears to the Court that there ought not to be a longer sentence in consequence of a ninth; the sentence in this case will therefore be reduced to one day's imprisonment.

Sentence reduced.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY, MR. JUSTICE A. T. LAWRENCE, MR. JUSTICE PICKFORD, AND MR. JUSTICE AVORY.

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A suggestion in cross-examination that a witness for the Crown has committed the offence charged is an "imputation" involved in "the nature or conduct of the defence" within s. 1 (f) (ii) *of the Criminal Evidence Act*, 1898.

Objection to the admissibility of questions tending to prove prisoner's previous "bad character" must be taken at the trial.

This was an appeal against conviction on a point of law and an application for leave to appeal against conviction on fact and against sentence. Appellant was convicted at the Liverpool City Sessions on the 1st April, 1912, of larceny, and was sentenced to six months' imprisonment with hard labour. The case was argued on the 6th May, 1912, before Bray, Pickford, and Avory JJ., who, without calling on counsel for the Crown, ordered the case to be re-argued before a fuller Court, on the ground that the case raised an important point on the admissibility of evidence of previous convictions, as to which the decisions in previous cases differed.

W. Madden for the appellant, who was not present. The appellant was indicted for the larceny of 65*l.* and a Post Office Savings Bank book from the person of Peter Quinn. The prosecutor had just arrived in Liverpool with his brother James on their way to Armagh, and on the 13th February the two brothers, with a friend named O'Hanlon, were in a small bar in Lime Street, measuring twelve feet by six, between 10.30 and 11 p.m., when the prosecutor fell in a fit on the floor. Four or five other men, including appellant, with whom the prosecutor's party had had no communi-

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cation whatever, were in the bar, and appellant and other men helped to raise the prosecutor; as they were doing so he called out "Take your hand out of my pocket," and found that the money which had been in a canvas bag in his left-hand trouser pocket was missing; later he discovered that the bank book, which had been in a different pocket, was missing also. Directly after the prosecutor had called out that he was robbed his brother and O'Hanlon left the bar. James Quinn stated that he was afraid of losing two parcels he had with him, so took them back to his lodging, although it was nearly closing time, and he returned to the bar in a quarter of an hour. O'Hanlon said he wished to try to sell some oysters which he had in a basket before the public-houses closed; he did not return. About an hour and a half later, the police having been notified of the robbery, a detective named Burgess went to appellant's house and asked him if he knew anything about it. He said "No"; the detective noticed he was fumbling in his pocket and asked what he had there; he produced a number of papers and was asked to feel in his pocket again; he did so and said there was nothing there; the detective then searched him and found the bank book in that pocket. The money missing was not found either on his person or in his house. Neither of the Quinns could identify appellant as having been in the bar, and it is only from his own admission that it is known that he was one of those who assisted to raise the prosecutor. He was convicted of stealing the bank book only.

In cross-examination I suggested to both James Quinn and O'Hanlon that they had stolen the money and bank book themselves; this was a necessary part of the defence looking at their conduct in the bar, and the fact that James Quinn knew that his brother possessed this money. The Deputy-Recorder held that this justified the prosecution in cross-examining the prisoner as to his having been bound over on a previous occasion for stealing fifteen shillings; this was the only previous conviction against him. I submit that this cross-examination was wrongly admitted; my questions were not a general attack on the witnesses' characters, but had reference to the actual *res gestæ*, and therefore did not come within s. 1 (f) (ii) of the Criminal Evidence Act, 1898. The point first arose in *Marshall*, 63 J. P. 36 (1899), where Darling J. decided to the contrary, and refused to state a case for the Court of Crown Cases Reserved, but I

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submit that that decision was wrong. *Bridgewater,* [1905] 1 K. B. 131; 74 L. J. K. B. 35; 91 L. T. 838; 53 W. R. 415; 69 J. P. 26; 20 Cox C. C. 737; 21 T. L. R. 69; C. C. R., is in my favour, and so is *Preston,* [1909] 1 K. B. 568; 2 Cr. App. R. 24; 78 L. J. K. B. 335; 100 L. T. 303; 73 J. P. 173; 53 S. J. 322; 25 T. L. R. 280; 21 Cox C. C. 773, where Channell J. said: "If the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner as to his antecedents and character with the view of shewing that he has such a bad character that the jury ought not to rely upon his evidence."

[At the previous hearing counsel also referred to *Jones,* 3 Cr. App. R. 67; 26 T. L. R. 59 (1909); and *Sheean,* 72 J. P. 232; 21 Cox C. C. 561; 24 T. L. R. 459 (1908).]

A. E. Griffith for the Crown. This case comes within the words of the section. Questions which are asked merely with the object of eliciting the facts in connection with the very matter with which the prisoner is charged have been held not to be an attack on the character of a witness within the meaning of the section; *Westfall, otherwise Murphy,* 7 Cr. App. R. 176; 28 T. L. R. 297 (1912), but the questions in this case were not within that category, for the prisoner had never suggested that either of the witnesses was the thief, although he had suggested that the detective had himself put the bank book into his pocket. The questions were not necessary for the development of the defence; it would have been sufficient to suggest that anyone else who was in the bar at the time could have stolen the book; this was an attack on the witnesses' "conduct outside the evidence" in the case, which on the authority of *Preston* let in evidence of the prisoner's character. Cases of rape, such as *Sheean,* are distinguishable; the question whether the act of the prisoner was against the will of the prosecutrix is an issue in the case the onus of which lies on the prosecution.

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[The LORD CHIEF JUSTICE: *Rouse*, [1904] 1 K. B. 188; 73 L. J. K. B. 60; 89 L. T. 677; 52 W. R. 236; 68 J. P. 14; 20 Cox C. C. 592; 20 T. L. R. 68; C. C. R., decides that where the prisoner merely denies emphatically something which the prosecutor has sworn to it does not expose him to cross-examination to character.]

If the cross-examination of the prisoner is held inadmissible objection was not taken at the time, and therefore, on the authority of *Bridgewater*, the conviction should stand.

Madden. It is true I did not object to the cross-examination, but in a question of admitted difficulty it was impossible to decide in a moment whether the cross-examination was admissible or not. Injustice should not be done to a prisoner because his counsel has omitted to take an objection. On the main question the prisoner only learned at the police court the facts which pointed to the possibility of James Quinn or O'Hanlon having committed the theft: a point in the prisoner's favour may be raised at any stage of the case.

The LORD CHIEF JUSTICE: The Court to-day is unanimous in the opinion that the cross-examination of the prisoner was admissible, and that therefore the appeal must be dismissed. My brothers who sat on the first hearing of this appeal were satisfied that Mr. Madden had not established any other grounds for the appeal. Having regard to the importance of the point and the contradictory decisions in reported cases, the judgment of the Court will be put in writing.

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The following written judgment was delivered by the Lord Chief Justice:—

In this case the appellant was convicted of stealing 65*l.* and a Post Office Savings Bank book from one Peter Quinn, and was sentenced to six months' hard labour. He applied for leave to appeal against conviction on the facts, and alleged misdirection; he also appealed on the ground that he was improperly cross-examined as to a previous conviction. The appeal was originally heard on Monday, the 6th, before Mr. Justice Bray, Mr. Justice Pickford, and Mr. Justice Avory. They were of opinion that

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there was no ground for interfering with the conviction upon the evidence or on the ground of misdirection. Upon the question of cross-examination the Court was of opinion that, having regard to certain expressions in the judgments of the Court in the cases of *Bridgewater* (1905), and *Preston* (1909), it was desirable that this point should be argued before a Court of five judges. Accordingly the case was re-argued on the 13th May.

The facts which gave rise to the questions are as follows. The prosecutor, Peter Quinn, and his brother James, and a man named O'Hanlon, were in a public-house between 10.30 and 11 on the night of the 13th February. The prosecutor, Peter Quinn, had in his pocket a bank book, and a canvas bag containing between 65*l*. and 70*l*. Five other persons, including the prisoner, were also in the same part of the public-house. After having some drinks, Peter Quinn, the prosecutor, appears to have fainted, or fallen on the floor, and was picked up by two or three men. While on the ground he felt someone's hand in his pockets, and on recovery missed the bag of money and the bank book. The bank book was found in the pocket of the prisoner about 12.30 the same night. James Quinn, the prosecutor's brother, was called to say what he had seen in the public-house, and in cross-examination, Mr. Madden, the counsel defending Hudson, asked him whether he and O'Hanlon did not get the 70*l*., and when O'Hanlon was called, Mr. Madden charged him with robbing the prosecutor and running away after robbing him. Later the prisoner was called, and Mr. Marshall, the counsel for the prosecution, applied to be allowed to cross-examine him as to his career, and the Deputy-Recorder gave him leave. No objection was taken by Mr. Madden. Before dealing with the point upon the merits we desire to express our concurrence in the observations of the Court in *R.* v. *Bridgewater* as to the absence of objection by the prisoner's counsel. The absence of objection is not conclusive, but it is a circumstance to be considered by the Court, and may, in some cases, have an important bearing upon the question whether an appellant should be entitled to raise on appeal the question whether he ought to have been cross-examined.

Dealing now with the question on its merits, the prisoner's counsel, in cross-examining the witnesses for the prosecution, suggested that each of those witnesses had in fact been concerned in the robbery. The Court is clearly of opinion that such ques-

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tions are within the words of paragraph (ii) of clause (f) of section 1 of the Criminal Evidence Act, 1898, "unless . . . . the nature or conduct of the defence is such as to involve imputations on the character of . . . . the witnesses for the prosecution." It was, however, contended that certain expressions in the judgment of the Court in the cases of *Bridgewater*, *Preston*, and *Westfall*, put a different construction upon the section, and laid down a general rule under which the cross-examination was not permissible.

The first reported case in which the question appears to have arisen is the case of *Marshall*, 63 Justice of the Peace, p. 36, in which Mr. Justice Darling, at the Central Criminal Court, after consulting the Recorder and Common Serjeant, ruled that in a case of murder, where a prisoner giving evidence alleged that the deceased had been killed by her husband, who had been called as a witness for the prosecution, she was allowed to be cross-examined as to previous convictions. This ruling has been followed on many occasions.

In *R.* v. *Bridgewater* a conviction was quashed on the ground that the appellant had been improperly cross-examined. In that case counsel for the prisoner had cross-examined a police sergeant Moss, suggesting that the prisoner—who was convicted for stealing copper—had acted under the instructions of Moss in obtaining possession. These questions put to Moss did not involve any imputation on his character, as he admitted that he had previously employed the prisoner to obtain information for him, and in giving judgment in that case I pointed out that the learned judge in summing up the case had told the jury that if they thought the prisoner was in point of fact acting under the directions of Moss they should acquit him. In *R.* v. *Preston*, a conviction was also quashed on the ground that the prisoner had been improperly cross-examined. In that case counsel for the prisoner had questioned the police inspector as to the way in which a certain attempt to identify the prisoner had been carried out. The prisoner had not been identified on the occasion in question, but it was suggested that the method of identification was unfair. My brother Channell, in delivering the judgment of the Court, said: "The statement in the present case was a mere unconsidered remark made by the prisoner without giving any serious attention to it, and in our opinion it does not come within section 1, sub-

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section (f) (ii) of the [Criminal Evidence] Act as being an imputation made upon the character of a witness for the prosecution for the purpose of discrediting his testimony. If that were the nature of the imputation, the prisoner could be cross-examined as to his character," and in the recent case of *R.* v. *Westfall*, where a prisoner had made an attack on the magistrate and members of the police force, and cross-examined the prosecutor as to his being a habitual drunkard, and made a charge of improper violence against the constable who arrested him, my brother Mr. Justice Hamilton, delivering the judgment of the Court, consisting of Mr. Justice Channell, Mr. Justice Lush, and himself, cited the two passages from the *Preston* and *Bridgewater* cases, and held that cross-examination of the prisoner was not admissible, following *R.* v. *Bridgewater* and *R.* v. *Preston*. The decision in these three cases may well be supported on grounds which do not touch the question raised in the present case. They cannot be treated as laying down a general rule applicable to all cases, and in the opinion of the Court they are not a complete enunciation of the law under the section. The Court certainly had no intention in giving judgment in *R.* v. *Preston*, of overruling *R.* v. *Marshall*, which was cited before them in the course of the argument. In our opinion where a prisoner—certainly when defended by counsel—has through that counsel accused the witnesses of having committed the crime with which he, the prisoner, is charged, the case comes directly within the section, and the prisoner can be cross-examined as to his character or previous convictions.

We think that the words of the section, "Unless . . . . the nature or conduct of the defence is such as to involve imputations," &c., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words "unnecessarily" or "unjustifiably" or "for purposes other than that of developing the defence," or other similar words.

Appeal dismissed.

Solicitor for the Appellant—*John A. Behn*, Liverpool.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE PICKFORD, AND MR. JUSTICE AVORY.

GEORGE LUMB.

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Where, after a trial, fresh evidence as to the prisoner's insanity is forthcoming, the Court will, in its discretion, leave the case to be dealt with by the Home Secretary (if he thinks fit to do so).

This was an application for leave to appeal against conviction and to call further evidence. Appellant was convicted at the Leeds Assizes on the 7th May, 1912, before Channell J. of wilful murder, and was sentenced to death.

L. G. Hoare for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of the murder of his mother. I do not desire to call the evidence referred to in his notice of appeal as it does not appear material, but I ask leave to call evidence on the question of sanity. I defended at the trial at the request of the judge, and had no opportunity of getting evidence to support this defence, although I put it to the jury. While the jury were considering their verdict the Leeds prison doctor told me that he would have been prepared to give evidence that the appellant was insane. I wish to call him, and also members of the appellant's family. The appellant at one time received a serious injury to his head, and his demeanour in Court at the trial indicated that he was insane. By an unfortunate accident the trial was incomplete. If the Court had the power to order a new trial it would do so. It should therefore give leave to appeal and to allow the fresh evidence.

Lowenthal (with him *A. H. Marshall*) for the Crown. As the case was presented at the trial the judge summed up as favour-

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ably as possible to the prisoner; there was really no evidence of insanity given. The appellant had only been at Leeds prison since the opening of the Assizes, some five days; he had been much longer at Wakefield prison, and the Wakefield doctor had made a report which was to the effect that the appellant was sane. I did not put that doctor in the box because no substantial issue of insanity had been raised.

The LORD CHIEF JUSTICE: The circumstances under which this Court would enter upon an enquiry under s. 9 of the Criminal Appeal Act are very special. It did so in *Loake*, 7 Cr. App. R. 71 (1911), but I am not aware that it has ever allowed expert evidence to be called after the trial. While recognising that the Court has the power to enquire into the question of sanity, we are of opinion that this is not a case in which it should be exercised. I repeat what I said in *Loake* and *Jesshope*, 5 Cr. App. R. 1 (1910), that in ordinary circumstances the Home Secretary, whose powers are expressly reserved by the Act, is in a better position to investigate these matters than the Court.

Application dismissed.

A. L. B. T.

GEORGE FITZGIBBONS.

Where, on a trial for murder, the defence was accident, the Court will not entertain an appeal on the ground that there was sufficient provocation to reduce the crime to manslaughter.

This was an application for leave to appeal against conviction and to call further evidence. Appellant was convicted at the Central Criminal Court before Phillimore J. on the 15th May, 1912, of wilful murder, and was sentenced to death.

Tully-Christie for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was convicted of the murder of his wife. I wish to call witnesses on the question of the wife's intemperate habits and nagging with a view to

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reducing the verdict to that of manslaughter. I defended the appellant at the trial, and at that time thought they were only witnesses to character; I had no proofs. At the trial my main defence was that it was an accident, but I told the jury that it was open to them to return a verdict of manslaughter. The judge should have given the jury some direction on this point, but he told the jury not to consider the question of manslaughter.

Bodkin and *Percival Clarke* for the Crown were not called upon.

The LORD CHIEF JUSTICE: In this case the jury returned a verdict of wilful murder, and it is impossible to say that there was not evidence to justify that finding; the character of the wound, which caused death within five minutes, was such that it is impossible not to come to the conclusion that it required considerable force, and it was a downward blow; moreover, there were two statements made by the appellant which were consistent with his knowing what he had done to his wife. The defence set up at the trial was that the blow was an accident, and of course it was necessary for Mr. Tully Christie not to make too much of the suggested nagging if that was his defence. For that reason it seems to us impossible to allow evidence of nagging to be called in order to get this Court to say the proper verdict could only be one of manslaughter; where the defence of accident has been seriously set up, this Court cannot give effect to a contention, or allow evidence to be called, inconsistent with the defence set up at the trial. The matter may be a proper one for the consideration of the Home Secretary; there was a recommendation to mercy by the jury, which will no doubt be considered by him.

Application dismissed.

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WILLIAM WHITE.

Where the defence is that property alleged to be stolen has been abandoned, there must be a specific direction to the jury on this point.

This was an appeal against conviction and sentence by leave of the full Court. Appellant was convicted at the West Bromwich Borough Sessions on the 23rd April, 1912, of feloniously receiving stolen property, and was sentenced to twelve months' imprisonment with hard labour, and one year's police supervision.

F. J. Wrottesley for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant was charged with the larceny of 5 cwt. of pig iron, the property of the Birmingham Canal Navigation Co., and was found guilty of feloniously receiving it. A man named Hinton had been previously convicted of the larceny. My first submission is that the prosecution never proved that the property in the iron in fact lay in the Canal Co., or in anyone; the evidence at the most was that it was taken from the company's premises, but the witnesses, though asked, could not say to whom it belonged. A private Act of the Canal Co. was put in, but only to prove incorporation, and Mr. Riley-Pearson for the prosecution said in answer to the Recorder that he did not rely on any section as passing the property in distinction from the general law.

Secondly, I submit that evidence of statements by the appellant was improperly admitted. Hinton had made a statement implicating the appellant, which was read to him by police-sergeant Richards, and he answered: "He is a liar, he won't say it before my face, he will be here to-day to say different." Shortly afterwards police-constable Jeffrey again read Hinton's statement to him, and he then answered: "If Hinton said that all well and good. It was on the side of the canal when I saw it. I helped him to shift it. He said he could sell it to 'Mann' Hooper." Hinton had said they had taken the iron out of the canal, so the appellant's statement was a contradiction and not an admission of the truth of Hinton's story so as to render it admissible in evidence; *Norton*, [1910] 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 54 S. J. 602; 26 T. L. R.

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550; 5 Cr. App. R. 65. In any case, the answer to Richards should have been accepted by the police, and the answer to Jeffrey excluded by the judge as being evidence extracted by the cross-examination of a police officer; *Knight*, 69 J. P. 108; 21 T. L. R. 310; 20 Cox C. C. 711 (1905).

Riley-Pearson for the Crown. There is sufficient property in the company if iron is deposited on the banks of the canal; no one but the true owner or an official of the company is entitled to remove such property.

[PICKFORD J.: In *Rowe*, 28 L. J. M. C. 128; Bell C. C. 93; 5 Jur. (N. S.) 274; 7 W. R. 236; 8 Cox C. C. 139 (1859), it was held that iron found in the bed of a canal when being cleaned was properly laid in the Canal Company.]

As to the statements, the second answer was a clear admission, and none the less although there was a slight variation from Hinton's story.

Wrottesley. *Rowe* is distinguishable. The iron in this case might have been cast on the bank by any passer by; in *Rowe* there were facts on which the jury could infer that the Canal Company were bailees, in this case there was no evidence of any kind. In any case, the jury were not directed on the law as to larceny by finding.

The LORD CHIEF JUSTICE: This case is very near the line, and the decision of the Court that this conviction cannot stand may be a fortunate one for the appellant. The trial does not appear to have been altogether satisfactory, but we do not propose to deal with the suggested admission made by the appellant; we should require further consideration of the authorities to decide the question, having regard to the circumstances under which the statement of Hinton was read to the appellant a second time.

But we are of the opinion that there was not sufficiently clear evidence, nor a sufficient direction, as to the property in the iron. The case must be taken to proceed on the ordinary principle that it is sufficient to lay the property in the person who was in possession of it. At first I thought that the statute had been pro-

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duced to shew a special section giving the canal company the right to prosecute in respect of any property on their premises, but the evidence shews that it was only put in to prove incorporation. The evidence, apart from the statement of Hinton, is that the iron was found somewhere on the banks of the canal, but that was consistent with its having been abandoned by the owner, whoever he was. If those were the true facts it seems to us that the Recorder ought to have given a clear direction as to what constituted larceny by finding. There was no direction that if property was abandoned on the canal banks the appellant might not be guilty of larceny in picking it up. The Recorder said: "Now if this iron was ever in the bed of the canal company, either it had been abandoned or thrown overboard by some passing boatman; still more if it had happened to be stored on the banks of the canal company, they would as against a wrong-doer, as against a person who had no right to touch the iron, have a special property in the iron which would entitle them to the protection of the law as against that wrong-doer." That statement goes too far; there was no evidence that it had been stored on the bank, and if it had been at some time in the bed of the canal it might well have been abandoned by the owner; further, the statement of law seems to include as a wrong-doer any one who touched the iron who had no title to it. If the property had been abandoned, the person charged has a right to have the jury directed that if he took it really believing that it was abandoned, he is not guilty of larceny. On the facts shewn it is not safe to allow the conviction to stand.

Conviction quashed.

A. L. B T.

GEORGE SULLIVAN.

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If a person alleged to be a habitual criminal is under probation, the probation officer should be called on the trial of that issue.

This was an appeal against conviction as a habitual criminal on the certificate of the Deputy-Chairman of the County of London Sessions, and an application for leave to appeal against conviction for larceny, and to call further evidence. Appellant was convicted at the County of London Sessions on the 30th April, 1912, of larceny and of being a habitual criminal; sentence was postponed.

Stanley R. Crawford for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The evidence in the larceny charge was most unsatisfactory; the witnesses were two boys, and there were several discrepancies between the evidence they gave at the police-court and that given at the trial. The watch which was the subject of the charge was not found on the appellant, and the appellant suggested that the prosecutor must have lost the watch before they met, but the Deputy-Chairman in his summing up said that if there was no one else in the neighbourhood, it followed that the appellant took the watch, disregarding the possibility that there was no watch to take.

On the charge of being a habitual criminal, I ask leave to call evidence as to his life since December, 1910; at that time he was bound over under the Probation of Offenders Act, 1907; I am informed that the probation officer, who was not called at the trial, can give a good report of him since that time.

Fordham for the Crown. If his evidence is satisfactory the Crown does not wish to press this conviction.

Mr. Massey, Probation Officer at the Old Street Police Court, called and stated: I saw the appellant about twice monthly from December, 1910, until July, 1911, and thought that he made a real effort to reform in that time. I set him up with

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materials for boot repairing in May, 1911; he worked in his lodging-house, and was still there in July. After that I did not see him until December, three days before the completion of his probation. His conduct while under my probation was fair.

Detective-Sergeant Smart called and stated: I know the prisoner well, but have not seen him for eighteen months. I heard he was selling fruit in 1910.

Crawford. The prisoner also states he has worked at the docks, which is confirmed by the police.

PICKFORD J.: The appellant has appealed against his conviction for the larceny of a watch, and also as a habitual criminal, As to the watch, the argument addressed to us is really an invitation to retry the case and to come to a different conclusion than that at which the jury arrived. To such an invitation this Court has never acceded. There was evidence, and evidence which required careful consideration, because it was given in greater detail at the trial than at the police-court, but this was properly dealt with in a very fair summing up, and the jury convicted. There was evidence on which they could do so, and therefore that part of the appeal must be dismissed.

As to the conviction as a habitual criminal, that stands on a different footing. The jury, in finding the appellant guilty, said the probation officer should have been present, and the Deputy-Chairman said: "Yes, I feel that so strongly myself that I am going to give this man a certificate for leave to appeal against his conviction as a habitual criminal. I have private information that the report of the probation officer is a comparatively good one, and I think if the probation officer had been here, in all probability you would have come to a different conclusion." The probation officer has been before us and says that the appellant's conduct was fair, and that for the first seven months he made a genuine attempt to lead a better life. In addition to that, detective-sergeant Smart, who speaks as to the appellant before 1910, gives quite a fair account of his conduct at that time. Therefore we have materials which the Deputy-Chairman thought might have induced the jury to come to a different conclusion;

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GEORGE SULLIVAN.

Pickford J.

so the conviction as a habitual criminal must be quashed, and the appellant must go back to the Sessions as sentence was postponed, and must be dealt with for the larceny of the watch.

Conviction as habitual criminal quashed.

A. L. B. T.

JOHN SAUNDERS.

Severity of sentence.
Exceptionally it may be proper to charge a person under thirty years of age with being a habitual criminal.

This was an appeal against sentence and an application for leave to appeal (refused by Pickford J.) against conviction as a habitual criminal. Appellant pleaded guilty at the Central Criminal Court before the Common Serjeant on the 25th April, 1912, of larceny, and was convicted of being a habitual criminal, and was sentenced on the 30th April to three years' penal servitude and five years' preventive detention.

Appellant in person. My sentence is too severe; my age is only twenty-six.

Davenport for the Crown. The only point in this case refers to the appellant's age. The Common Serjeant postponed sentence for some days in order to consider the Home Office circulars, one of which says that a person who is indicted as a habitual criminal must be, in the absence of special circumstances, over thirty years of age. In giving judgment, the learned judge pointed out that in these cases the certificate authorising prosecution is given by the Director of Public Prosecutions, in whom is vested, by the Prevention of Crime Act, 1908, the determination who is a fit subject for the Act. The appellant had only been out of prison for thirteen days when he was arrested. The Director of Public Prosecutions considered the question of the appellant's age, which, however, he understood to be twenty-eight instead of twenty-six.

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The LORD CHIEF JUSTICE: In our opinion we should not interfere in this case. It is true that a circular has been drawn up by the Home Office with regard to the ordinary practice, but, on the other hand, the Director of Public Prosecutions may take a different view for strong special reasons. The circumstances of this appellant's career are such as to shew that a severe punishment must be inflicted. He has been ten times convicted between 1901 and 1912. He must have penal servitude, which could not be for less than three years. As a result of this particular sentence he will, if he behaves himself, get considerable advantages, and possibly an earlier release. We ought not, in a case like this, to interfere solely on the ground that his age is twenty-six.

Appeal dismissed.

A. L. B. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE AVORY.

ENRICO MALATESTA. 1912 10 *June.*

On the issue whether a document is libellous, regard must be had to the known opinions of those to whom it is addressed.

This was an appeal against conviction and sentence. Appellant was convicted on the 20th May, 1912, at the Central Criminal Court, of writing and publishing a libel, and was sentenced to three months' imprisonment, recommended for expulsion, and ordered to pay the costs of the prosecution.

Dickens, K.C. (with him *St. John Macdonald*) for the appellant, who was present. The verdict was unreasonable and was against the weight of evidence. The appellant is an electrical engineer who holds certain anarchist opinions. He does not advocate the use of bombs or violence in any form, but he disapproves of the subjection of the people to governments, and, in particular, he strongly disapproves of war as an unnecessary evil inflicted upon the people of the belligerent nations by their Governments. When the war broke out between Italy and Turkey, the appellant, true to his principles, disapproved of it, and spoke strongly against it; while the prosecutor, one Ennio Bellelli, a bookseller, who had up till then been also a conscientious anarchist, became a strong supporter of the war, and spread a report that the appellant was a Turkish spy. Eventually the appellant published a circular, which is the libel complained of, justifying himself, and addressing to Bellelli what, I submit, is a fair challenge and no libel at all. It is written in Italian, and the effect of it is this: "Bellelli calls me a Turkish spy.

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There are people who say that Bellelli is a mysterious person who obtains more money than he is likely to make by his bookselling, and many look on him as an Italian spy. I am willing to come before a jury of honour and satisfy them how I earn every penny that I get. Let Bellelli do the same, and if he does not satisfy them how he gets his money, he must allow that it has been proved that he is an Italian spy." Taken as a whole, this is a fair challenge, and there was no sufficient evidence to justify the finding that it was a libel.

Secondly, the sentence is too severe, and the appellant ought not to be recommended for expulsion. The police evidence as to his character was most unfair. He has lived in England for twelve years as an avowed anarchist, and no charge has ever been made against him nor has any suspicion of inciting to violence ever rested upon him. The police had no grounds for saying that he was a dangerous type, or for hinting that he was concerned in the Houndsditch murders (see 6 Cr. App. R. 232). I will read from the shorthand note of the evidence in that case.

[The LORD CHIEF JUSTICE: You have given no notice to the Crown, and you are not entitled to give it in evidence. I find, however, that it was used in this Court in another case and is therefore on the record of this Court, and we will let you read it.]

The note shewed that appellant's name was merely mentioned incidentally in that case.

The appellant is a peaceable citizen who has not abused the hospitality of England in any way, and has not been guilty of any crime in the ordinary sense, but at the most of infringing a private right, and I submit that the recommendation for expulsion ought to be struck out. In view of his opinion of the war it will be dangerous for him to return to Italy.

Hinde for the Crown was not called upon.

DARLING J.: The libel in this case was written and published in Italian, the native language of a colony of people living together in this country, and was headed, "To the Italian Colony of London," and the evidence shews that a large number of those who would read and understand the libel are

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called anarchists. Mr. Dickens has given a definition of anarchism, and it appears that anarchists hold views inconsistent with the continued existence of society as organized in any country known to us. The Common Serjeant rightly told the jury that it might be a libel to say of a person that he had left the society of anarchists and had become an Italian spy, if it held him up to the hatred of the society in which he lived, and it was left to the jury to say whether the circular in this case did in fact hold Bellelli up to the hatred of the people amongst whom he lived. The jury found that it did, and their verdict was not unreasonable. The whole basis of the circular is that it is a dangerous thing in that society to be accused of being a spy of any Government.

As to the sentence, there is no doubt that we have power (under s. 21 of the Criminal Appeal Act) to quash any part of it, including the recommendation for expulsion made under 5 Edw. 7, c. 13, the Aliens Act, 1905, s. 3. We are asked to say that the Common Serjeant ought not to have made the recommendation in this case. The Common Serjeant made it quite clear that he did not do so because the appellant was an anarchist, but he did so on the ground that Bellelli, being also an anarchist and being accused of being an Italian spy, would be in personal danger; it is probable that such an accusation being made by one side of an anarchist society against the other side, some crime, and possibly some assassination, may be committed. In spite of his opinions, Bellelli is within the King's peace. On consideration of all the circumstances there is no sufficient reason why that part of the sentence which recommends deportation should be quashed. The appeal is dismissed, and the sentence will run from the date of conviction.

Appeal dismissed.

Solicitor for the Appellant—*James Clarke.*

A. E. A. N.

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Lord Alverstone C.J.
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WILLIAM ARNOLD THOMSON.

Hearsay evidence cannot be admitted merely on the ground that it is tendered in favour of the defendant.

Gloster, 16 *Cox, C. C.* 471 (1888), *followed.*

This was an appeal against conviction on a question of law. Appellant was convicted at the Central Criminal Court before Phillimore J. on the 17th May, 1912, of using an instrument upon a woman called Alice Bromwich with intent to procure abortion, and was sentenced to three years' penal servitude.

Hugh Sturges (with him *Montague Shearman, jun.*) for the appellant, who was not present. The appellant is a doctor who has practised at Maidenhead for twenty-two years, and in September, 1911, he was consulted there by a widow named Alice Bromwich, who lived at Acton, and had been recommended to consult the appellant by a mutual friend, Grace Murray. The appellant attended Mrs. Bromwich at Acton in September and October, 1911, and again on the 21st March, 1912, on which day he is charged with having used the instrument in question. By the 26th March, when he saw her next, she had had a miscarriage. He saw her on the 27th and the 29th March, in the presence of Miss Murray. On the 1st April she was moved to a hospital and died there the next day, her death being due to kidney disease and not to any operation or miscarriage.

My first point is that evidence was wrongly admitted as to what occurred in September and October. Mr. Muir said in his opening, and Hodgins gave evidence in chief for the prosecution, that the deceased woman was pregnant in August, 1911, and that the pregnancy passed away in October. Subsequently the appellant was cross-examined as to his introduction to her, and it was elicited from him that he went with her to Acton on the 19th of September, and examined her for pregnancy, and found that she was pregnant, and on the same day performed an operation upon her which he entered in his ledger as an "operation for hæmorrhoids," and in October visited her three times after she had had a miscarriage. This cross-examination tended to shew that he had committed another crime in September, and the questions should therefore not have been put or answered; Criminal Evidence Act, 1898, s. 1 (f). Proof

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that he had performed an illegal operation in September would not have been admissible within sect. 1 (f) (i) of that Act. This case is distinguishable from *Bond*, [1906] 2 K. B. 389; 75 L. J. K. B. 693; 95 L. T. 296; 54 W. R. 586; 70 J. P. 424; 21 Cox C. C. 252; 22 T. L. R. 633; C. C. R. There it was admitted that instruments adapted to procure abortion had been used. It was suggested that they were used for a lawful purpose, and not to procure abortion (see [1906] 2 K. B. at p. 409), and the evidence in question was admitted as negativing this suggestion. Here there is no admission that any instrument has been used at all. According to Hodgins the appellant said that he had touched her with a catheter to satisfy her, but this was denied by the appellant. Therefore the only question at issue is whether the instrument was used or not, and upon that issue evidence as to the previous operation is inadmissible (*Bond*, per Darling J., [1906] 2 K. B. at p. 410, and per A. T. Lawrence J. at p. 424). Accident or mistake was not set up, and had not to be rebutted. The prosecution may not call evidence to rebut defences which are not likely to be set up (*Bond*, per Darling J., [1906] 2 K. B. at p. 409, explaining the rule laid down by Lord Herschell, L. C., in *Makin* v. *The Attorney-General for New South Wales*, [1894] A. C. 57 at p. 65; 63 L. J. P. C. 41; 6 R. 373; 69 L. T. 778; 17 Cox C. C. 704; 58 J. P. 148).

My second point is that evidence of statements by the deceased woman was wrongly excluded. I ought to have been allowed to ask Grace Murray questions in cross-examination which would have elicited (1) that early in February, 1912, the deceased woman said that she was pregnant, that she knew about procuring abortion, and had access to the instruments, and intended to do it herself if she could get no one else to do it, and (2) that on the 29th March, 1912, she told Grace Murray that she had procured the miscarriage herself. These statements were a necessary part of the defence, and ought on that ground to have been admitted. Also they were part of the *res gestæ*. The ruling of Quain J. in *Edwards*, 12 Cox C. C. 230 (1872), covers this case. The ruling of Cockburn C. J. in *Bedingfield*, 14 Cox C. C. 341 (1879), would have been different if the statement of the deceased had been in the prisoner's favour, see the note at p. 345.

R. D. Muir (with him *Travers Humphreys*) for the Crown.

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was called upon on the second point only. The statements made by the deceased woman were rightly excluded as hearsay, and there is no principle of law on which they can be admitted. If the argument that any defence may be set up irrespective of the rules of hearsay evidence were right, then the same kind of evidence must be admitted for the prosecution. If that is right, then the provisions of Russell Gurney's Act and the law of dying declarations would be unnecessary. It would be dangerous to admit statements such as those made by the deceased in this case, because in every case of death from abortion an accomplice might come to swear that the deceased had said that she had done it herself. On the other hand, exclusion is in favour of the prisoner, for in most cases the statement excluded is against the prisoner. If it were admitted in the one case it would have to be admitted in the other. Anyhow, in this case there was another statement made by the deceased to Hodgins, and if the question of miscarriage of justice is to be considered, the Court should be told what that statement was. As to the admissibility of the first statement, namely, that she intended to do it, *Wainwright*, 13 Cox C. C. 171 (1875), is conclusive.

The LORD CHIEF JUSTICE: In this case if we had to consider whether there was a miscarriage of justice, the evidence, especially upon the question whether the deceased woman could have done the operation herself, and the careful summing up of the evidence, would leave no doubt in our minds that there was no miscarriage of justice. The woman died on the 2nd April. The evidence established that on the 21st of March an interview of at least two hours had taken place between appellant and the deceased, and preparations were made for an operation, and afterwards bed linen was found stained with blood. After death it was discovered that the deceased had a scar on the womb consistent with an illegal operation having been performed about ten days before. The appellant admitted the interview on the 21st March and the miscarriage which took place before the 26th, and though he alleged that he had done nothing with instruments, he admitted that he had examined her with his finger to satisfy her as regards her pregnancy. There was evidence that he said he had touched her with a catheter. If this were so, it raised the ques-

tion whether he had not used it to procure a miscarriage. He was cross-examined as to the previous history of his relations with the woman, and it was elicited that in the previous September she had come from Acton to Maidenhead to consult him, that he had gone back with her to Acton, and after examining her for pregnancy, had done something to her which caused blood to flow. We are of opinion that this evidence was admissible on the principle in *Bond's* case, and as testing the probability of his excuses for touching the woman's body on the later occasion, and as shewing the history leading up to the interview of the 21st of March.

Secondly, it is said that a statement by the deceased woman early in February that she intended to procure a miscarriage was wrongly excluded. There can be no doubt that this statement was inadmissible. But it is further said that five days before her death she said to Grace Murray that she had procured a miscarriage and had done it herself—which statement was repeated by Grace Murray to the appellant. There is no principle upon which this statement is more admissible than any other hearsay. No doubt the rejection of such evidence is on the whole greatly in favour of accused persons. If this hearsay could be admitted there would be no necessity for special rules as to dying declarations and declarations against pecuniary or proprietary interest. There is no rule that a defendant is entitled to prove anything by way of defence, even if it involve the admission of hearsay evidence. In *Gloster*, 16 Cox C. C. 471 (1888), Charles J. said at page 473: "Mr. Poland proposes to ask the witness what the deceased said as to her bodily condition and what had been done to her. My judgment is this: That the statements must be confined to contemporaneous symptoms, and nothing in the nature of a narrative is admissible as to who caused them or how they were caused." In our opinion the ruling of Charles J. was quite correct. Nor can the statement be admitted as part of the *res gestæ*. In this case there was no reason for straining any existing rule in order to admit evidence in favour of the defendant, for the defendant was allowed to say in the hearing of the jury what Grace Murray had repeated to him as statements of the deceased. In our opinion the ruling of Phillimore J., rejecting the evidence of Grace Murray on this subject, was right, and it may be that the evi-

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dence given by the appellant of the statements made to him by Grace Murray would not have been admitted, if objected to by the prosecution. Neither of the points raised on behalf of the appellant is a good ground for quashing the conviction.

Appeal dismissed.

Solicitors for the Appellant—*Indermaur and Brown*, for *Weed and Mason*, Maidenhead.

A. E. A. N.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE RIDLEY, AND MR. JUSTICE AVORY.

CHARLES KNIGHT.

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Severity of sentence.

This was an appeal against sentence by leave of the full Court. Appellant was convicted on the 4th May, 1912, at the Central Criminal Court, before the Recorder, of feloniously receiving stolen goods, and was sentenced to five years' penal servitude.

H. J. Turrell for the appellant, who was present. The stolen property in this case was seventeen carpets, valued at £700; they were stolen from a van on the 10th January, and were not received by the appellant until the 22nd January. This interval suggests that the appellant was not the instigator of the robbery. He is fifty-seven years of age, and has carried on business for a number of years, attending auctions. He has never been convicted before, but the police gave evidence that he was an associate of all the principal receivers, and had been a receiver himself for twenty years. He was charged with receiving in 1889, but acquitted, and soon after that a similar charge was dismissed by the magistrate. Since then he has been under the observation of the police, who have never been able to bring any charge against him till now.

Curtis Bennett for the Crown. The van was taken from the Strand, and found empty at Dalston; the appellant took a stable in Lavender Hill, to which all the carpets are brought. He

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made no suggestion on arrest that anyone else was guilty, but said, "I take all responsibility." There is no evidence implicating him with the goods before the 22nd January, nor that the stable was used for receiving anything but the carpets.

Turrell: When the appellant said he took the responsibility he was referring to a van boy named Thorogood, who was found unpacking the carpets with him. Thorogood was charged with the appellant, but the Recorder held that there was no evidence against him to go to the jury.

RIDLEY J.: In this case the appellant appeals against a sentence of five years' penal servitude which was passed upon him by the Recorder of London for feloniously receiving stolen goods. The offence was undoubtedly a serious one; a large quantity of carpets, valued at £700, had been stolen from a van and conveyed eventually to a coach-house which had been taken by the appellant on the morning of the day on which they were brought there. The question for this Court is whether a sentence of five years' penal servitude is more than should have been imposed, notwithstanding the serious nature of the offence. The police stated that they had known the appellant for twenty years as an associate of all the principal receivers and as a receiver himself, and the Recorder then said, "I suppose it is very difficult to catch a receiver," and the detective answered, "Yes, and in this case considerable expense has been incurred in keeping the prisoner under observation." In sentencing the appellant, the Recorder said, "You have been carrying on this business, according to the police, for a long time. If there were no receivers these sessions would last a much shorter time than they do, because no one would steal such things if there was no one to receive them." With the spirit of these observations we concur; I believe that in a similar case at Leeds Assizes I gave a sentence of five years' penal servitude, and I understand that a similar sentence was recently passed at Birmingham. But in this case there was no evidence that the appellant had any place of deposit such as a shop in which he kept stolen property; at any rate, he had none to the knowledge of the police. There was suspicion against him in the opinion of the police, but on the whole, while con-

curring in the observations of the Recorder, the Court is of the opinion that the sentence is too severe, and that it should be reduced to one of three years' penal servitude.

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Sentence reduced.

Solicitor for the Appellant—*A. Marchant.*

A. L. B. T.

CHARLES MITCHELL.

On the allegation of being a habitual criminal, when the interval between the last release from prison and the latest offence is substantial, the jury ought not to convict without positive evidence of a persistently dishonest or criminal life: this cannot be inferred from the mere failure of a convict on licence to report himself to the police, nor from the multitude of the previous convictions.

This was an appeal against conviction as a habitual criminal, by leave of Pickford J., and an appeal against sentence. Appellant was convicted at the Salisbury Assizes on the 20th May, 1912, before Channell J., of feloniously receiving stolen goods and of being a habitual criminal, and was sentenced to three years' penal servitude and five years' preventive detention.

K. M. Macmorran for the appellant (under s. 10 of the Criminal Appeal Act), who was present. My submission in this case is that no evidence was given that the appellant was leading persistently a dishonest or criminal life. He was released from his last term of imprisonment on licence on the 30th August, 1911; he reported himself in September, but not since, and the police said they knew nothing about him after that date until the 10th February, when he committed the crime of receiving stolen goods. Failure to report is all that was suggested as being evidence against him, and if I had defended him at the trial I should have submitted that there was no evidence to go to the jury. The learned judge accepted the prisoner's statement that he had done some work in the time. *Heard*, 7 Cr. App. R. 82; 28 T. L. R. 154 (1912), is in my favour.

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Ratcliffe Cousins for the Crown. The jury had the fact that the last four convictions overlapped, *i.e.*, the appellant had been for fifteen years either in prison or out on licence, except for one short interval. He was on licence on February 10th. Evidence was given of four previous convictions. *Kelly*, 3 Cr. App. R. 248; 26 T. L. R. 196; 74 J. P. 167 (1909), is in favour of the prisoner, but in that case the judge omitted to draw the attention of the jury to the length of time elapsing between the prisoner's last release from prison and the commission of another crime; in this case the jury were properly directed on the point, and found the appellant guilty.

AVORY J.: The appellant in this case has been convicted as a habitual criminal, and the only question the Court has to determine is whether there was any proper evidence to be left to the jury to bring him within the words of s. 10 (2) (a) of the Prevention of Crime Act, 1908. If there was there is no ground for quashing the conviction, for no fault can be found with the summing up. The concluding words put the matter in a nutshell: "If the evidence satisfies you that in February he had gone back to his old life, then you will find him guilty of being a habitual criminal. If you think it is not made out in this case you will say it is not proved against him."

It must be borne in mind that the statute contains two distinct elements which it is necessary should be established to constitute a man a habitual criminal. Firstly, the three convictions since attaining the age of sixteen, and secondly, that he is, that is, at the time when he is found committing the crime for which he is indicted, leading persistently a dishonest or criminal life. The second element is not established merely by proof of a number of convictions beyond the three; there must be evidence on which the jury can find that he is leading persistently a dishonest or criminal life, and for that reason this Court has said on several occasions that the attention of the jury must be directed to the interval between the commission of the crime for which he stands charged and his last release from prison, where that interval is substantial. In this case the appellant was released from his last sentence on the 30th August, 1911, and the offence to which he pleaded guilty was committed on the 10th February,

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1912, an interval of five and a half months. The offence to which he pleaded guilty was receiving a small portion of the property stolen burglariously from a post office; the property found in his possession was a pipe and some tobacco. If the prisoner had been represented at the trial by counsel it would no doubt have been submitted that there was no evidence to establish the second element of the offence. The judge informs us that he had grave doubts whether any evidence had been given to establish that, and that he had left the case to the jury in order that the point might be tested. He says that he is satisfied that the appellant had done honest work for half the time, but he thought the fact that he had not reported himself was some evidence to go to the jury on this issue. The judge, in sentencing the appellant, said, "It may be, if you care to appeal against this—most habitual criminals do take advantage of the law in that respect—it may be the Court will say there was not sufficient evidence for me to have left it to the jury. I am not at all confident that there was."

Having these views of the judge before us, the opinion of the Court is that there was no sufficient evidence to be left to the jury that the prisoner was leading persistently a dishonest or criminal life. There was evidence that the prisoner had for some months at all events been doing honest work; there was no evidence of what he had been doing after that until the commission of the offence. The mere fact, standing alone, that a convict on licence has not reported himself to the police is not sufficient, in the opinion of the Court, to establish that he is leading persistently a dishonest or criminal life.

The past record of the prisoner is as bad as it could possibly be, and if the number of convictions were enough to constitute a man a habitual criminal, there is no doubt he would be within the category. But it is necessary, notwithstanding the number of convictions, that where there is a substantial interval there should be some evidence from which the jury may infer that the prisoner is leading persistently a dishonest or criminal life. There was no such evidence here, and therefore the conviction as a habitual criminal must be quashed, and the Court must substitute the proper sentence for that passed in respect of receiving the pipe and tobacco. In our opinion the proper sentence is twelve

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months' imprisonment with hard labour, to run from the date of conviction; there is also a *remanet* of his last sentence to be served.

Conviction as habitual criminal quashed and sentence reduced.

A. L. B. T.

WILLIAM BATTY.

On an indictment for receiving stolen property something more must be proved against the defendant than mere association with the criminals.

This was an appeal against conviction and sentence, by leave of Scrutton J. Appellant was convicted at the Burnley Borough Sessions on the 24th May, 1912, of feloniously receiving stolen goods, and was sentenced to four months' imprisonment with hard labour.

Hildesheimer for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The ground of appeal in this case is that there was no evidence connecting the appellant with the robbery, and that the submission at the end of the case for the prosecution that there was no case to go to the jury ought to have been acceded to by the Recorder. The summing up does not appear on the shorthand notes, which are unsatisfactory in other respects. The appellant was indicted with three other men, Cronshaw, Bolton and Blakey. Some time between the 4th and the 6th April, some cloth was stolen from a mill at Burnley; Cronshaw, on the 6th April, in the presence of Bolton and Blakey, asked a man to remove the cloth to 48, Albion Street, and these three prisoners were at that house when the goods were delivered. The appellant had taken the house in September, 1911; the rent was payable quarterly, but the March rent was in arrear at the time, and he had removed from the house; it was not suggested that he was in it after the 27th March. He had notice to quit in June. Nothing else was suggested as

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coupling the appellant with the crime except the fact that Cronshaw was his traveller and Blakey had been his lodger. (He was stopped by the Court.)

C. A. Lamb for the Crown. The matter turned on the association of these men. Blakey, though a single man and possessing no furniture, took the house to which the appellant and his wife went after leaving Albion Street, in his own name, but for appellant; Cronshaw was his canvasser and in daily communication with him.

[AVORY J.: Is not this pressing the maxim *noscitur a sociis* rather far?]

RIDLEY J.: The appellant was tried with three other men for stealing cloth, and was convicted. It appears that the cloth was removed on the 6th April and taken to 48, Albion Street. The only suggested evidence against the appellant is that in the previous September this house had been taken, in the name of his wife, by the appellant. The tenancy would have expired in June, but he had not been in the house after the 27th March, more than a week before the stolen goods were brought there. In the course of the evidence nothing was proved to connect the appellant with the other prisoners except that one was his lodger and the other his traveller. There was nothing to indicate that in this matter he had been in communication with them; and therefore at the close of the case for the prosecution a submission was made that there was no case to go to the jury. The Recorder said, "Well, there is the fact that this house in Albion Street was taken in his wife's name, the fact that he became the tenant, and that during the tenancy the stolen property was found there." The case was left to the jury, and they convicted all the prisoners. We are of opinion that there was no evidence to be submitted to the jury. It is necessary in such cases to be most careful and not to give a jury the chance of convicting when there is no evidence to go before them, but only circumstances of suspicion; and in my own opinion the circumstances of this case were barely suspicious. Is the fact that the appellant had been the tenant of the house to which the stolen property was brought sufficient to raise the presumption that he was a party to the

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WILLIAM BATTY.

Ridley J.

theft? It is perfectly consistent with his honesty, and there is nothing to connect him with the theft by his lodger or his canvasser. The Recorder has let us know that he had great doubts whether the appellant was rightly convicted; in the opinion of the Court he was not, and the conviction must be quashed.

Conviction quashed.

A. L. B. T

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